No. 8117

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FERRYBOATMEN'S UNION OF CALIFORNIA (an unincorporated association), FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY and THE WESTERN PACIFIC RAILROAD COMPANY,
Appellees.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellee.

BRIEF FOR APPELLEES.

HENLEY C. BOOTH,
A. A. JONES,
65 Market Street, San Francisco,
Attorneys for Appellees.

Subject Index

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BRIEF FOR APPELLEES.

Appellants appeal from final orders and decrees against them by the United States District Court for the Northern District of California, Hon. A. F. St. Sure, Judge, in certain proceedings and suits brought

by them on the equity side of the Court wherein they seek recovery against each of the appellees for certain amounts which if payable at all are payable under the terms of contracts between the appellees and their ferryboatmen made in 1925 but amended by an award made by a Board of Arbitration created under the Railway Labor Act of 1926 and affirmed by a judgment of the District Court entered under Sec. 9 of that Act.

A RESTATEMENT OF THE FACTS.

Rule 24 requires that appellant's brief contain a statement of the case, which appellee need not furnish "unless that presented by the appellant is controverted".

Appellant's statement of the case (Brief pp. 1-7) is argumentative, incomplete and, in important respects, inaccurate. We shall, therefore, restate the case using as the basis and ground-work for the restatement the special findings of the trial judge before whom the testimony was taken *viva voce*. In such of his findings as we reproduce we insert references to the printed record in this Court, supply italics for emphasis and supplement the findings by further references to the printed record.

It is noteworthy that the trial judge, Hon. A. F. St. Sure, was the same judge before whom was heard the proceeding to impeach the original award, considered by this Court in *A. T. & S. F. Ry. et al. v. Ferryboatmen's Union,* 28 Fed. (2d) 26. Moreover

counsel err in stating (Brief p. 5) that "there was no conflict of testimony". There was sharp conflict in the testimony in a number of respects we shall designate; we take it that appellees are entitled to the benefit of whatever presumption may be given the conclusions reached by the trier-of-fact on substantial conflict of testimony.*

The Facts as Shown by the Special Findings.

(*Finding I, R. p. 118*): "The above entitled cases are the outgrowth of an award filed with the Clerk of this Court on October 31, 1927, pursuant to an arbitration held under the Act of Congress known as the Railway Labor Act. (44 Stat. p. 577; 45 USCA Sec. 151, et seq.)"

"The present controversy is between defendant railroads and the assignee of their employees. An accounting and additional back pay is sought for what plaintiff claims to have been overtime work performed during a six-months' period from March 1, 1928, to September 1, 1928, and not paid for. The railroads claim that these employes were fully paid for that period.

"In 1925, the Atchison, Topeka & Santa Fe Railway, Northwestern Pacific Railroad Company, Southern Pacific Company and the Western Pacific Railroad (hereinafter called the carriers), had separate agree-

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*(NOTE): Preceding the special findings the trial judge filed a written opinion (R. pp. 91-111) to which we respectfully refer.

ments covering 'hours of service, working conditions and rates of pay' with their employes classified as marine firemen, deckhands, cabin watchmen, night watchmen, and matrons (hereinafter called the union), 'employed on passenger, car and automobile ferries, tugs towing car floats and fire boats' operated by the carriers on San Francisco Bay." (*The Southern Pacific agreement is at pp. 68 et seq. of the Record. It was also admitted in evidence as Plffs. Ex. No. 2 (R. pp. 146-7); The Northwestern Pacific agreement was substantially the same. (R. p. 291).)*

(*Finding II, R. pp. 119-122*): "On January 7, 1927, the carriers entered into an agreement with the union under said Railway Labor Act to submit to arbitration certain demands of employes for increases in pay and changes in working conditions. A copy of the agreement is attached to defendant's answer in each case, and marked Exhibit 'B'. (*R. pp. 81 et seq. It was also admitted in evidence as Plffs. Ex. 3; R. p. 147.*) The agreement provided: 'The specific questions to be submitted to the Board for decision are whether or not there shall be any increase in the wages or changes in Working Rules Nos. 6 and 8 of the employes of these railroads. . . .

"Rule 6 then read: '*Assigned crews,* except as hereinafter provided, will work either on basis of: (a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off, or (b) Eight (8) hours or less on watch *each day for six (6) consecutive days.*' (*R. p. 82.*) Then follows a list of 'exceptions', some of which will be referred to later.

"Rule 8 then read: 'The monthly salary now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of *the present recognized straight time assignment* shall be paid for in addition to the monthly salary at the pro-rata rate.' (*R. p. 84.*)

"The specific questions submitted under Rule 6 were: '(a) Shall the rule remain as written, or (b) shall the portion of the rule down to the word "exceptions" be changed so as to read: "Assigned crews will work on the basis of eight (8) hours or less on watch *each day for six (6) consecutive days.*"' (*R. p. 84.*)

"The specific questions submitted under 'Rule 8—Overtime' were '(a) Shall the present rule providing for pro-rata rates of pay for overtime remain in effect, or (b) Shall the verbiage of the rule be modified to provide for time and one-half for overtime after eight (8) hours when there is no relief crew waiting under pay?' (*R. p. 85.*)

"In its award, a copy of which is attached to Plaintiffs' Bill in each case as Exhibit 'A' (NOTE: *This is slightly in error. The award is included in the judgment, Ex. A to Plffs. Complt., R. p. 23, the judgment having been admitted in evidence as Plffs. Ex. 7 (R. p. 148)),* the board increased wages $10 per month, fixing the rates of pay as follows *(R. p. 25):*

"Passenger and car ferries, and tugs towing car floats:

Firemen	$146.35	per month
Deckhands	139.40	" "
Cabin Watchmen	139.40	" "
Night Watchmen	120.00	" "
Matrons	85.00	" "
Fire Boats:		
Firemen	97.57	" "
Deckhands	92.94	" "

"The award changed Rule 6 to read as follows: 'Rule 6. Assigned crews will work on the basis of eight (8) hours or less on watch *each day for six (6) consecutive days'. (R. p. 25.)*

"The award affirmed Rule 8, above quoted. *(R. p. 27.)*

"Petition for impeachment of the award filed by the carriers was dismissed by this Court and the award confirmed. Upon appeal, the decision of this Court was affirmed by the Circuit Court of Appeals on August 20, 1928. *Atchison, T. & S. F. Ry. Co., et al. v. Ferryboatmen's Union of Cal.,* 28 F. (2d) 26.

"On May 19, 1928, pending the appeal from decision of this Court to the Circuit Court of Appeals, the carriers and the union entered into a stipulation (NOTE: *Included in the judgment at pp. 28 and 29, Record),* the pertinent part of which reads as follows:

> '1. That the ten dollars ($10.00) per month increase made by said award is to be put into effect and paid beginning May 1, 1928, and is to remain in effect until April 1, 1929, and there-

after subject to the 30-day provision in the existing contracts between the Ferryboatmen's Union of California and the respective carriers, copies of which contracts are exhibits in this case and are on file in the records of this Court.

'2. That the $10.00 per month increase is to be retroactively paid to January 1, 1927; payment of such retroactive increase is to be made to the employees in service during all or any part of the period from and including January 1, 1927, to and including April 30, 1928, as early as practicable and not later than June 15, 1928.

'3. That if the above entitled Circuit Court of Appeals affirms the decree confirming the award the retroactive date of the new watch rules which are a part of that award shall be advanced from November 1, 1927, to March 1, 1928.

'4. On the coming down of the remittitur or mandate from the Circuit Court of Appeals to the District Court the judgment of the District Court shall incorporate and *confirm the terms of this stipulation* irrespective of whether said Circuit Court of Appeals affirms or reverses the judgment and order of the District Court heretofore rendered herein.'

"After affirmance by the Circuit Court of Appeals, this Court, on September 29, 1928, entered a judgment incorporating the award and said stipulation." (NOTE: *That judgment is Plffs. Ex. 7, R. p. 148, and is reproduced in full as Exhibit A to one of the complaints at pp. 23-34 of the Record.)*

(Finding III, R. p. 122): "A copy of the judgment, which embodies said stipulation as well as the award of the Arbitration Board, is set forth in full as Ex-

hibit 'A' in Plaintiff's Bills in each suit *(R. p. 23)*, and is incorporated by reference in the answers of defendants, Southern Pacific Company and Northwestern Pacific Railroad Company, in each case.

"Copies of the agreements of 1925 between the employees represented by their union, on the one hand, and defendants, Southern Pacific Company and Northwestern Pacific Railroad Company, on the other, fixing wages and working conditions are set forth as Exhibit 'A' in the answers of defendants in each case." *(R. p. 68.)*

(Finding IV, R. p. 123): "During the period from and including March 1, 1928, to September 1, 1928, the carriers, as appears by their answers, continued in employment in the same capacities certain of their employees 'who had formerly and prior to said arbitration agreement been employed as so-called '12-hour men', and so continued them upon the same basis or hours of service and on the same regular assigned watches as they and all of the so-called 'former 12-hour men' had been employed prior to said arbitration agreement'."

"During the pendency of the appeal the carriers, in accordance with the award and stipulation, paid the $10 per month wage increase to all employes. On September 26, 1928, the mandate of the Circuit Court of Appeals affirming the decree of this Court was filed herein."

(*Finding V, R. pp. 125-6*): "On September 30, 1928, the carriers made payment to their employes for overtime, the amounts so paid being ascertained by

the application of the following formula to each individual work record:

'Memorandum as to application of (313 divisor)* wage rates and methods of computing back pay for Marine Firemen, Deckhands, Cabin Watchmen and Night Watchmen, serving on 12-hour watch assignments, and who were accorded 48-hour week under Arbitration Award.

Monthly, Daily and Hourly Rates of Pay are as follows:

Classification	Monthly Rate	Daily (8-Hour) Rate	Hourly Overtime Rate
Passenger and Car Ferries and Tugs Towing Car Floats			
Fireman	$146.35	$5.6109	.7014¢
Deckhand	139.40	5.3444	.6681¢
Cabin Watchman	139.40	5.3444	.6681¢
Night Watchman	120.00	4.6006	.5751¢
Matron	85.00	3.2588	.4073¢

'Employes who served on twelve (12) hour watch assignments, (56-hour week) are entitled to the benefits of forty-eight (48) hour week, in way of additional compensation, commencing with March 1st, 1928. That is, (except on Fire Boats where there is no change) they should receive the same compensation as would have accrued to eight (8) and sixteen (16) hour assigned men, working the same number of hours.

*(NOTE): The "313" divisor refers to the fact that where a man worked continuously on the 8-16 hour watches throughout the year he was on watch each day for six consecutive days, as required by Rule 6 as it read before the award (Finding I. supra) as well as after the award (Finding IX) and therefore worked but 313 days per year (365 minus 52). To ascertain the daily pay of an "8-16 hour" man Rule 2. which was unchanged by the award, except as to monthly rates of pay, provided (Finding IX) that 12 times the monthly salary should be ascertained and then divided by 313.

'It is concluded that the best way to arrive at the balance due any such individual, is to take the total number of eight (8) hour days, and the number of hours overtime served during a month and multiply the same by the above enumerated daily and hourly rates, then allow as additional compensation, the difference between the total so obtained and the amount of compensation (exclusive of any special adjustments) the employe has already received for that month. In most instances this can be reduced to a certain additional amount per day or hour, and so shown on the pay-roll for more complete record purposes.

'Care should be exercised to see that credit is taken for back pay allowances on special payrolls for the months of March and April, 1928, the $10.00 per month wage increase allowed being included on regular payroll commencing with May 1st.

'Under above, individual back pay allowances for months of March, April, May, June, July and August, should be computed separately for each month, but all included on one payroll, that one pay-check may be issued to cover all that is due any employe. For month of March make additional allowance only in connection with watches that were commenced at midnight of Feb. 29th-March 1st, 1928, or thereafter. For August include on back payrolls only watches commencing prior to midnight of Aug. 31st-Sept. 1st, 1928.

'Commencing with Sept. 1st, 1928, such employes involved should be compensated on the new (48-hour week) basis on regular payrolls. Hours of service assignments as provided for in Rule 6 and its exceptions as contained in the Arbitra-

tion Award, should be made effective as rapidly as practicable.'

"It is hereby found that the rates per hour and per day contained in the foregoing formula were correctly computed and applied."

(*Finding VI, R. p. 126*): "When the original proceedings were had, the Ferryboatmen's Union of California, to which had been theretofore assigned the claims of the individual employes, was an unincorporated association. On October 2, 1931, the union was incorporated as a nonprofit corporation under the laws of California, and on the same day, the unincorporated union assigned to the corporation all of its rights and interest in said claims of the employes and in the judgment of this court, and the corporation now appears as the plaintiff herein seeking in equity an enforcement of the decree in the original proceeding; the suit against the Atchison, Topeka, Santa Fe Railway Company has been settled; the Western Pacific Railroad has, by stipulation of counsel, agreed to abide by the final decision herein. The only defendants now before the Court are the Southern Pacific Company and the Northwestern Pacific Railroad Company."

(*Finding VII, R. pp. 126-7*): "The union filed three several pleadings all involving the same subject matter and concerning which there could be under the circumstances, but a single recovery. In the original proceeding, Case 1955-S, there was filed a motion 'that the Court make such other orders as will be necessary or proper to carry into effect the judgment

and decree heretofore entered herein', including a reference to a commissioner to ascertain the amounts due. The union also filed, in Case 1955-S, an ancillary bill to enforce the judgment and also filed separate bills in equity (Cases Nos. 3635-S and 3636-S) against each carrier for an accounting. In each suit or proceeding the same relief was sought and therefore the proceedings and suits above referred to were consolidated, tried and submitted for decision as one case. Motions that plaintiff elect its remedy were denied."

(*Finding VIII, R. p. 127*): "Defendants, in their several answers, affirmatively pleaded that a dispute, as defined under the provisions of the Railway Labor Act (U. S. Code Supp. II, Title 45, Sec. 151, et seq.) existed between them and their employes as to the meaning and application of the award and that this Court had no jurisdiction to entertain either or any of plaintiff's causes of action; the Court found and now finds it has jurisdiction of the parties and subject matter."

(*Finding IX, R. pp. 127-9*): "The evidence shows that the award changed Rule 2 of each 1925 working agreement by increasing the rate of pay as above specified, but the following language of the rule remained unchanged: 'Note: Employes working broken assignments will be paid in following manner: (a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313. (b) On 12 and 24 watches, allow one and one-half days for each watch worked, on basis of 12 times the monthly salary divided by 365. * * * Above applies to

employes whose monthly assignment is broken as well as to relief employes and those in extra service.'

"The award affirmed Rule 8 defining overtime, above quoted, and left unchanged Rule 9, relating to fixing overtime rate, as follows:

> '*Rule 9.* To compute the hourly overtime rate divide twelve times the monthly salary by the present recognized straight time annual assignment. Note: Under above the hourly overtime rates, for employes working different assignments, will be arrived at in the following manner: (a) On 8 and 16 watches, divide 12 times the monthly salary by 2504. (b) on 12 and 24 watches, divide 12 times the monthly salary by 2920.'

"Under said award, eight consecutive hours constituted a day's work with certain exceptions not applicable to the plaintiffs' assignors. Under the 1925 agreement and until changed by the award assigned crews worked either on the basis of (a) twelve hours on watch, then twenty-four hours off watch, without pay for time off, or (b) eight hours or less on watch *for six consecutive days.* The award eliminated the twelve-hour watch, establishing hours of service as in Rule 6 above quoted, with the exceptions above referred to.

"Following the award, the carriers continued to assign certain crews and employes from March 1, 1928, to August 31, 1928, inclusive, under the former twelve-hour watch, paying the men at the increased monthly rate, but nothing for overtime until the adjustment was made in September, 1928; under the 1925 agreement a twelve-hour man was not entitled

to overtime until he worked twelve hours on watch; that no time over twelve hours on watch is involved here, all time over twelve hours on a single watch having been fully paid."

(*Finding X, R. pp. 129-130*): "The evidence shows the purpose of the carrier's formula, above quoted, was to equalize the pay of the 12 and 24-hour men who worked during the period March 1st to August 31, 1928, with the pay of the 8 and 16-hour men who worked during the same period; that the straight-time rate and the overtime rate of the carriers were and are the same; and that under the adjustment made by the formula, the hourly and daily rate of compensation of the 12 and 24-hour men was exactly the same as that of the 8 and 16-hour men. That the rate of pay here contended for by the union would give the 12 and 24-hour men a preference in pay of about eighteen per cent. per hour worked over the pay of the 8 and 16-hour men when both classes were working on regular assigned watches; that before the award, the 12-hour men worked more hours per month than the 8-hour men on regular assigned watches, and their hourly earnings were less than the 8-hour men, there being thereby created an inequality of from 10 to 13 per cent. against the 12-hour men because *while* (*sic*) the monthly pay of both classes on regular assigned watches was the same."

(Finding XI, R. p. 130): "There are two distinct classes of claims involved herein. There are, first, the 12 and 24-hour men who did work all of the assigned watches in a month; that is, the 20 or 21 twelve-hour watches in the month, and, second, those men who

worked less than the 20 or 21 twelve-hour watches and who are called broken assignment men. Over 25 per cent of the claims are for broken assignments which were not payable on the basis of a full month's pay but adjustable under Rule 2, hereinbefore referred to. One of the principal objects of the arbitration was to equalize the pay between these two classes; that by the September adjustment plus what they had already received under said stipulation, the 12-hour men got exactly what the 8-hour men were paid when they worked 8 hours straight time and 4 hours overtime."

Finding XII (R. p. 130) contains a tabulation showing that firemen (and the same illustration applies to all of appellant's assignors) who worked all 12-24 assigned watches in a calendar month were fully paid when the adjustment check was given to them.

Finding XIII (R. p. 132) contains an analytical tabulation showing that a "12-24 hour" man who worked but one 12 hour assigned watch during a month was fully paid for the four hours overtime on that 12 hour watch.

Finding XIV (R. p. 133) shows by a similar table "12-24 hour" men who worked "broken assignments" during a month—that is, not all of the 12 hour assigned watches that fell within that month (see Finding XI, supra)—were fully paid for the four hours overtime on each 12 hour watch.

Finding XV (R. p. 134) similarly shows by detailed analysis that the "12-24 hour" men "were paid full 8-16 hour rates for days and hours worked as well as overtime".

The illustrations contained in Findings XII, XIII, XIV, and XV, supra, cover all the classes of claims in suit—that is, the case where one of plaintiff's assignors worked but one 12 hour assigned watch in a month, the case where he worked more than one 12 hour assigned watch in a month but not all of the 12 hour assigned watches in that month, and, finally, the case where he worked all of the 12 hour assigned watches in that month.

All of the assigned claims held by appellant fall in one or another of those classifications. Therefore repetition of the elaborate tables that appear in the record and that show the service of each "12-24 man" during the period in question would needlessly complicate this statement of facts.

(Finding XVI, R. p. 135): "It is hereby found that each defendant railroad did with respect to its employes who, as aforesaid, assigned their claim to said unincorporated union, fully pay to such employe by said September, 1928, adjustment all sums of money then due, owing or unpaid him under said award, stipulation or judgment and that each of the defendants has fully complied with said award, stipulation and judgment."

(Finding XVII, R. p. 135): "The evidence shows that when said September, 1928, adjustment was made the carriers issued and delivered counterprinted pay checks to each individual employe having a claim for overtime. These checks were in the usual form of payroll voucher issued in payment for services by the respective railroad companies, with additional words

printed on the face of the checks as follows: On each adjustment of the Southern Pacific Company, immediately following the statement of the sum for which payment was made, were printed these words and figures: *'For additional compensation account arbitration award between So. Pac. Co. and Ferry Boatmen's Union, Oct. 21, 1927. For March to August, 1928, inclusive.'* On each adjustment check of the Northwestern Pacific Railroad Company were printed these words and figures: *'Balance due for period Mar. 1, '28 to Aug. 31, '28 account wage adjustment.'* And on the reverse side of each of said checks issued to the employes of the two railroads above mentioned, and above the signature of the payee, appeared the following words: *'Endorse here. This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within.'* " (*Later in the brief we will point to the evidence that sustains this and the next succeeding findings.*)

(Finding XVIII, R. p. 136): "The evidence shows that the judgment directed the carriers to put the wages and rules of the award into effect and cause all of said employes to be paid all back pay retroactively or otherwise due to them in accordance with the award. The judgment was not a liquidated demand, but necessitated an interpretation of the award. The judgment was not one for which the union could enter satisfaction of record, as the individual employes were the actual judgment creditors of the company.

"Before the checks were delivered to the employes, the business manager of the union and the representa-

tive of its members under the Railway Labor Act, stated to an official of the carriers 'that for each 12-hour watch worked the men were entitled to 4 hours overtime'. The official for the carriers said 'the company would pay the men what was due them under the award'. The official further said in explanation that the checks were issued in the special form above described as he understood the men 'contemplated making some technical claims'. The carriers construed the award and paid the men the amounts they considered due to the men, using the form of check above described. Payment was accepted by the men, the check clearly indicating what it was for, and the payee in each case signing acknowledgment of receipt in full."

(*Finding XIX, R. p. 137*): ". . . found that there was a dispute concerning the amount due and the payments represented by the aforementioned checks and that they were accepted in full satisfaction thereof; in each case the defendant carriers, in their answers, set forth the affirmative plea that by reason of the foregoing facts the employes released them from all claims and demands for or on account of having worked on 12-24 hour watches or more during the period March 1st to August 31st, 1928, both days inclusive. *The facts and circumstances are sufficient to sustain the defense of the carriers of an accord and satisfaction and of a release.*"

Changes Made by the Award.

The Agreement of 1925 contained 38 numbered sections. (*R. pp. 68-80.*) The Agreement to Arbi-

trate (*R. pp. 81-88*) submitted three "specific questions" (*R. p. 82*) "whether or not there shall be any increase in the wages, or changes in working rules Nos. 6 and 8, of the employes of these railroads".

It followed the requirement of subd. (f) of Sec. 8 of the Railway Labor Act of 1926 (44 Stat. 584) that the agreement to arbitrate "shall state specifically the questions to be submitted to the said board for decision" and that the "board shall confine itself strictly to" those questions.

Thus there was to be no rewriting of the contract; the Board was confined strictly to considering and passing on a specified and limited number of amendments.

For convenient reference we now present in parallel columns certain sections of the Contract of 1925 relevant to the case and the Board's amendments to certain of those sections.

Agreement of 1925

Rates of Pay.

Rule 2 (R. p. 69):

Passenger and Car Ferries and Tugs Towing Car Floats:

Firemen
$136.35 per month
Deckhands
$129.40 per month
Cabin Watchmen
$129.40 per month
Night Watchmen
$110.00 per month
Matrons
$75.00 per month

Fire Boats:

Firemen
$90.90 per month
Deckhands
$86.30 per month

NOTE: Employes working broken assignments will be paid in the following manner:

(a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313.

(b) On 12 and 24 watches, allow one and one-half days for each watch worked, on basis of 12 times the monthly salary divided by 365.

(c) On 12 and 24 watches, with one watch off per month, allow one and one-half days for each watch

Changes Made by Award.

Rates of Pay.

Rule 2 (R. p. 25):

Passenger and Car Ferries, and Tugs Towing Car Floats:

Firemen
$146.35 per month
Deckhands
$139.40 per month
Cabin Watchmen
$139.40 per month
Night Watchmen
$120.00 per month
Matrons
$85.00 per month

Fire Boats:

Firemen
$97.57 per month
Deckhands
$92.94 per month

(NOTE BY APPELLEES: It will be observed that the note to Rule 2 was not changed by the award. The Arbitration Board had no power to do so granted by the Agreement to Arbitrate. See R. p. 82.

It is important to note that in the original Rule 2 as well as in the amended Rule 2 the same monthly salary is paid irrespective of the number of hours on and off watch.)

worked, on basis of 12 times the monthly salary, divided by 347.

Above applies to employes, whose monthly assignment is broken as well as to relief employes and those in extra service.

Basic Day.

Rule 5 (R. p. 70):

Eight (8) consecutive hours shall constitute a day's work.

Hours of Service.

Rule 6 (R. pp. 70-1):

Assigned crews, except as hereinafter provided, will work either on the basis of:

(a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off.

or

(b) Eight (8) hours or less on watch each day for six (6) consecutive days.

Exceptions.

(1) On boats with two crews, watches may be separated by an interval of time.

(2) Extra crews may be used on any day it is found necessary to operate one or two-crewed boats beyond assigned hours of regular crews.

Basic Day.

Rule 5 was not submitted to or changed by the Arbitration Board.

Hours of Service.

Rule 6 (R. pp. 25-7):

Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days.

Exceptions.

(1) On boats with two crews, watches may be separated by an interval of time.

(2) Extra crews may be used on any day it is found necessary to operate one or two crewed boats beyond assigned hours of regular crews.

(3) On basis of Section (a) of this Rule, length of watches may be varied as necessary to arrange relief, but must average eight (8) hours per calendar day in any cycle of three (3) weeks.

(3) Where three crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed twenty-four (24) hours *and no crew works over forty-eight (48) hours in six (6) consecutive days.*

(4) Where two crews are used, watches may be as long as eight hours and forty minutes, provided the combined watches do not exceed sixteen hours and no crews work over forty-eight hours in six consecutive days.

(4) Where two crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed sixteen (16) hours and *no crew works over forty-eight (48) hours in six (6) consecutive days.*

(5) On boats operating out of Vallejo Junction, one crew will be used each day. Employes will work twelve hour watches for two days, with the third day off, without pay for time off, and repeat.

(5) On boats operating out of Vallejo Junction crews *may be assigned twelve (12) hours per day and not to exceed forty-eight (48) hours per week.*

(6) On tugs towing car floats crews working on basis of Section (b) of this Rule may be worked not to exceed nine hours and twenty minutes per watch.

Crews on basis of Section (a) of this Rule will be given one watch off per month. Such watch will be designated by the Railroad.

(6) On one and two crewed tugs towing car floats crews may be worked not to exceed (9) hours and twenty (20) minutes per watch.

(7) On fire boats, crews will work twenty-hours on

(7) On three crewed tugs, towing car floats and

and then twenty-four hours off without pay for time off.

(8) Limit anywhere provided on length of watches does not apply in emergency or when necessary to make extra trips to handle heavy volume traffic which cannot be handled on schedule trips.

(9) Watches on three-crewed boats shall not begin or terminate between one (1) A. M. and six (6) A. M.

(10) Employes required to operate boat to and from yard shall be paid regular run rates.

car ferries, except on Carquinez Straits, crews *may be assigned twelve (12) hours on watch with twenty-four (24) hours off watch, provided such assigned watches average forty-eight (48) hours per week* within the time required to bring it about.

(8) On Fire Boats, crews will work twenty-four (24) hours on and then twenty-four (24) off without pay for time off.

(9) Limit anywhere provided on length of watches does not apply in emergency or when necessary to make extra trips to handle heavy volume of traffic which cannot be handled on schedule trips.

(10) Watches on three crewed boats shall not begin or terminate between one (1) A. M. and six (6) A. M.

(11) Employes required to operate boats to and from yard shall be paid regular run rates.

(12) Night Watchmen may be assigned on *twelve (12) hour watches four (4) days per week.*

(NOTE BY APPELLEES: None of plaintiffs' assignors worked under these excep-

tions. But the Arbitration Board clearly recognized the principle that on regular assigned watches the carrier was entitled to 48 hours per week for the monthly salary and also recognized the "six consecutive day" principle by using the language we have italicized in exceptions 3, 4, 5, 7 and 12 in this column.)

Overtime.

Rule 8 (R. p. 72):

The monthly salary now paid the employes covered by this Agreement shall cover the *present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate.*

Overtime.

Rule 8 (R. pp. 27-28):

The monthly salary now paid the employes covered by this agreement shall cover the *present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate.*

(Note by Appellees: Rule 8 was submitted to the Arbitration Board on the employes' claim of "time and one-half" instead of "straight time" for overtime hours. (Agreement to Arbitrate, R. p. 85.)

The Board, as shown, made no change in the text of the rule but republished it in the award, obviously because it had changed Rule 6.)

Fixing Overtime Rate.

Rule 9 (R. p. 72):

To compute the hourly overtime rate divide twelve times the monthly salary by the present recognized straight time annual assignment.

NOTE: Under above the hourly overtime rates, for employes working different assignments, will be arrived at in the following manner:

(a) On 8 and 16 watches, divide 12 times the monthly salary by 2504.

(b) On 12 and 24 watches, divide 12 times the monthly salary by 2920.

(c) On 12 and 24 watches, with one watch off per month, divide 12 times the monthly salary, by 2776.

Overtime for employes operating under Exception (5) to Rule 6, Fireboat employes and night watchmen, will be computed under Section (b) of this note.

(NOTE BY APPELLEES: The divisor, 2504 in (a) of the Note to Rule 9 is produced by multiplying 313 eight hour watches per year by 8 hours for each watch.)

Fixing Overtime Rate.

Rule 9 was not submitted to the Board of Arbitration and the Board made no reference to it.

ARGUMENT.

I.

THE ISSUES ARE WITHIN NARROW LIMITS.

Plaintiffs' demands for additional pay.

1. Plaintiffs' demands relate only to men who worked on regular assigned "12-24 hour watches"—that is, 12 hours on duty and then 24 hours off duty—during all or part of the six months of March to August, inclusive, 1928. None of those men worked under the "Exceptions" to Rule 6. Plaintiffs' assignors were of two classes:

(a) Those who worked all of the 20 or 21 "12-24 hour" watches during an entire calendar month.

(b) Those who, during a calendar month worked one or more but not all of the 20 or 21 "12-24 hour" watches during that month. Those are called "broken assignments".

2. Each of plaintiffs' assignors who worked any time over 12 hours on any one watch was paid "overtime" currently for the additional time worked. That character of "overtime" is not here involved.

3. Each of plaintiffs' assignors who worked all of the 20 or 21 "12-24 hour" watches during a calendar month was currently paid the monthly wage rate for that month as increased by the award.

4. Each of plaintiffs' assignors who worked one or more 12-24 hour watches on a "broken assignment" was paid currently at the 12-24 hour rate (as increased by the award's increase of $10 per month) for the time worked. (Table, R. p. 307.)

5. The fact that the men who worked under "3" above worked more hours per month than 8-16 hour men, and the men who worked under "4" above worked more hours per watch than 8-16 hour men, required an adjustment at the end of the six months' period to comply with the stipulation that if the award was affirmed the new watch rules should be retroactive to March 1, 1928.

6. The adjustment was made by additional pay checks given to plaintiffs' assignors—who worked under paragraphs "3" and "4" above—the amount of which, in each case, when added to the amounts previously paid currently during those six months on the basis shown in paragraphs "3" and "4" above gave plaintiffs' assignors "exactly what the 8 hour men were paid when they worked 8 hours straight time and 4 hours overtime". (Finding XI, R. p. 130.)

Results of plaintiffs' demands for additional pay.

But the plaintiff demands additional pay for each of its assignors. To sustain that demand

(a) would result in those of them who worked all of the 20 or 21 regular assigned 12-24 watches in a month receiving a month's pay at the increased monthly rate for the first 8 hours of each of the 20 or 21 twelve hour watches worked plus overtime for the last 4 hours of each 12 hour watch, whereas the 8-16 hour men of the same class worked 26 or 27 eight hour watches during the same month for the same monthly pay and

without overtime pay, the *monthly* pay being the same for both classes of watches; and

(b) would result in each of plaintiffs' "12-24 hour" assignors receiving about 18% more per hour for his work than the 8-16 hour men received, whereas before the arbitration a "12-24 hour" man received some 13% less per hour than the 8-16 hour man, "one of the principal objects of the arbitration" being "to equalize the pay between these two classes". (Finding XI, R. p. 130.)

The trial Court—as we believe and shall urge as strongly as we may—correctly declined to grant demands so at variance with an important object of the arbitration and so opposed to all considerations of equity and principles of interpretation of contracts.

Accord and satisfaction and release.

As separate defenses each appellee pleaded accord and satisfaction as well as release. The Southern Pacific adjustment checks bore on their faces a special sentence which read: "Arbitration Award between So. Pac. Co. and Ferryboatmen's Union, Oct. 31, 1927. For March to August, 1928, inclusive. For Additional Compensation Account." (R. p. 228.) The Northwestern Pacific adjustment checks bore a special sentence reading: "Balance due for period Mar. 1, '28 to Aug. 31, '28. Account wage adjustment." (R. p. 230.)

Each check was signed by the payee under the following printed endorsement. (R. pp. 229-30.)

> "Endorse Here. This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated herein."

Those defenses of accord and satisfaction, and release, presented mixed questions of fact and law. The trial Court found the facts in each defendant's favor. (Findings XVII, XVIII and XIX, R. pp. 135-137.) We will discuss the law in Chapter VII of this brief.

The rule applicable to consideration of the findings of the trial Court.

Appellants argue the evidence as though this appeal were a hearing *de novo*. They sued in equity and this Court has held in four cases (*Clements v. Coppin* (C. C. A. 9), 61 F. (2d) 552, 557; *McCullogh v. Penn. Mutual Life Ins. Co. of Phila.* (C. C. A. 9), 62 F. (2d) 831; *U. S. etc. v. McGowan* (C. C. A. 9), 62 F. (2d) 955; *Collins et al. v. Finley* (C. C. A. 9), 65 F. (2d) 625, 626) that findings of the trial Court in a suit in equity based on conflicting testimony taken in open Court will not be disturbed on appeal.

If, as we believe, the instant suits are not in equity, although instituted and heard in that form, but are essentially cases at law by an assignee of unpaid wage claims (see Chapter VI of this Brief), then the rule is, as stated by Circuit Judge Parker in *Fidelity & Deposit Co. v. People's Bank et al.* (1934), (C. C. A. 4th), 72 Fed. (2d) 932-934:

"Although the case is essentially one at law, it was heard in equity by the court below, without objection from appellant, and was brought here by appeal in equity. We review it, therefore, as though it were an equity cause. Twist v. Prairie Oil & Gas Co., 274 U. S. 684, 692, 47 S. Ct. 755, 71 L. Ed. 1297; Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp. (C. C. A. 4th), 64 F. (2d) 347, 348. This does not mean, however, that we will hear the case de novo, or will assume the function of auditors with respect to the voluminous books and records which have been certified to the court, but that we will review it as we do any other equity case under the rule that the findings of fact of the trial judge will not be reversed unless clearly wrong. Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.r supra; U. S. Industrial Chemical Co. v. Theroz Co. (C. C. A. 4th), 25 F. (2d) 387; New York Life Ins. Co. v. Simons (C. C. A. 1st), 60 F. (2d) 30."

Citing the case just referred to that rule is made part of the text by Mr. O'Brien on page 55 of his 1935 Cumulative Supplement to the second edition of his *Manual of Federal Appellate Procedure.*

Counsel for appellants have followed the somewhat common practice of assuming that where the evidence is directly or inferentially conflicting the appellants' evidence should control.

A DISCUSSION OF THE CASE ON THE MERITS.

The arrangement of appellants' brief is such that for us to attempt to answer its points seriatim would only result in further cloudiness and confusion.

We shall, therefore, endeavor to argue the salient points in the main case as we see them and as the trial Court found them in appellees' favor.

II.

The appellants' theory results in giving its assignors eighteen per cent more per hour than the men who were performing the same class of services at the same time on 8-16 hour watches during the six months in question, and who worked six consecutive days per week. Such was not the object of the arbitration or the intention of the award or of the stipulation made pending appeal to this Court.

In the opinion filed by the trial judge he says (R. p. 99):

> "In addition to the foregoing statement the following facts are undisputed: * * *
>
> "(R. 101) That the purpose of the carriers' formula, above quoted, was to equalize the pay of the 12 and 24-hour men with the pay of the 8 and 16-hour men; that the straight-time rate and the overtime rate of the carriers are the same, and that under the formula the rate of compensation of the 12 and 24-hour men was exactly the same as that of the 8 and 16-hour men; that the rate of pay contended for by the union would give the 12 and 24-hour men eighteen per cent additional over the 8 and 16-hour men; that

> before the award, the 12-hour men worked more hours per month than the 8-hour men and their hourly earnings were less than the 8-hour men, an inequality of from 10 to 13 per cent against the 12-hour men, which caused dissatisfaction and led to the arbitration."

The language just quoted from the opinion is repeated *verbatim* in Finding X. (R. p. 129.)

Let us take as typical the case of a fireman who worked on an 8-16 hour assigned watch before the award and compare it with a fireman who, before the award worked on a 12-24 hour assigned watch.

Each of them received $136.35 per month. (R. p. 82.) But the 8-16 hour fireman worked 313 eight hour watches per year or 2504 hours per year and Rule 9 (which was unchanged by the award) provided (R. p. 72) that his hourly rate should be ascertained by dividing 12 times his monthly salary by 2504 (12x$136.35=$1,636.20; divided by 2504 hours equals $.65343 per hour).

The 12-24 hour fireman worked only 245 watches per year but, because of the 12 hour watch, a greater number of hours per year than the 8-16 hour man and therefore while he received the same amount per *month* he received a less amount per *hour;* 12x$136.35 =$1,636.20; divided by 2920 hours per year under Rule 9, supra, equals $.56034 per hour, or a differential of about 14.25% *per hour* against the 12-24 hour man, although he received the same pay *per month* and *per year* as the 8-16 hour man.

An amicable agreement was arrived at on May 1, 1926, between the carrier and the Union to iron out

some inequalities in computations and rates resulting from the strict application of Rule 2, as well as to provide some working interpretations of the contract rules. It is explained in witness Gorman's testimony (R. pp. 291 et seq.) and the formulae introduced as Defts.' Ex. D, R. page 295. Under it practically the same difference in percentage of *hourly* pay remained in favor of the 8-16 hour men. It is otherwise unimportant to the consideration of these appeals.

Because of the petition for impeachment and the Court proceedings that followed, the former 12-24 hour men continued to work on those assigned watches after the award was filed with the clerk of the District Court and until a judgment was entered by that Court on order of this Court, finally disposing of the controversy and affirming the award. They so worked during the six months—March-August, 1928. During that six months the award was suspended.

The additional checks they received and cashed in October, 1928, plus the amounts they had already received currently placed them on an exact parity with the men who had been working on 8-16 hour assigned watches during that six months period so far as earnings *per hour* were concerned. This is not—and cannot truthfully be—disputed. If no adjustment had been made in September, 1928, the 12-24 hour men would have worked during the 6 months period at the same rate per month as but at a lesser rate per hour than the 8-16 hour men as above shown. And if this Court had directed the District Court to annul the award that differential would have remained and no

adjustment of the 12-24 hour men's pay would have been required.

But, not satisfied with the final adjustment putting them on the same hourly basis of pay as 8-16 hour men in the same class of service during that six months they now seek a basis of recovery which would give them about 18% more per hour than the 8-16 hour men just mentioned.

That is entirely inconsistent with the purpose of the arbitration and the spirit of the award.

We illustrated this unjust and unfounded claim of an 18% differential by a table introduced in evidence by us on the examination of witness Gorman. (R. p. 257.) That table follows:

(Defendants' Exhibit F, R. p. 258.)

Analysis of Hours and Pay of Two Firemen Beginning Watches, March 1, 1928, 6:30 a. m.; "A" on 12-24 Hour Basis and "B", the Other, on 8-16 Hour Basis.

12-24 man "A" No. of 12-hr. watches	Total Hours	8-16 man "B" No. of 8-hr. watches	Total Hours
March 21	252	27	216
April 20	240	26	208
May 20	240	26	208
June 20	240	26	208
July 21	252	27	216
August 21*	252	26	208
6 months 123 in Suit	1476	158	1264

*Last 12-hour watch in Aug. ran into Sept. but paid for as Aug. watch.

DURING THE 6 MONTHS

Each man ("A" and "B") received by semi-monthly pay checks 6 mos. pay at $146.35 (the award rate) $878.10

8-16 hr. man's monthly pay=
.7014 per hr. on watch
12-24 hr. man's monthly pay=
.6014 per hr. on watch

BY ADDITIONAL PAY-CHECK DATED

Sept. 30, 1928, the 12-24 hr. man ("A") received 157.11

(Arrived at by taking 1476 hrs. as 184½ constructive 8-hr. days x $5.6109 DAILY 8-HR. RATE =$1035.21 less $878.10 already paid) $1035.21

THE 12-24 HOUR "A" MEN HAVE BEEN PAID PRIOR TO SUIT

$1035.21 ÷ 1476 hours = $.7014 per hour or the same rate per hour as the 8-16 "B" men

FORMER "A" EMPLOYEES—ABOVE ILLUSTRATION*—NOW SUE FOR

123 watches at 8 hrs. to equal 6 mos. at $146.35 per mo., or ..... $ 878.10

and 123 4 hr. overtime periods, or 492 hrs. at $.7014 per hr. 345.09

$1223.19

Less amount already pd. 1035.21

$ 187.98

*NOTE: As shown in tabulation at the beginning of this exhibit the 8-16 hour men worked 158 8-hour watches during the same 6 months.

THE AMOUNT THE FORMER "A" MEN NOW SUE FOR PLUS THAT ALREADY PAID EQUALS

> $1223.19 ÷ 1476 hrs. = $.8287 per hour, as against the 8-16 hr. man's $.7014 or an 18 + % differential in favor of the 12-24 hr. men, thus creating an inequality in favor of the former 12-24 hour "A" men and against the former 8-16 hour "B" men.

Witness Gorman stated with respect to the result of the final adjustment (R. p. 259):

> "The effect of the additional pay check in the case of the 12 and 24 hour man was to raise the amount he received per hour to exactly the same amount that the 8 and 16 hour man had received by his monthly pay check. This was 70.14 cents per hour.
>
> If each day were treated as a unit, as the men sue for in this case, this would create an earning for them of 82.87 cents per hour as against the earning of the 8 and 16 hour men of 70.14 cents, or a differential of 18 plus per cent in favor of the men who worked during that 6 months on the 12 hour shifts."

Witness C. W. Deal, Secretary and Manager of the Union, admitted on direct examination in rebuttal (R. p. 275) "for many years the men working 12 hour watches had been paid a less rate than the 8 hour men". Obviously he meant "a less rate per hour" because the monthly rate was the same for both classes of assigned watches before and after the award.

Further on page 208, on cross-examination when he appeared in plaintiff's case in chief, Deal said:

"Mr. Deal. The 12-hour men did not always get the same amount as the 16-hour men. The wages fixed in the contract were the same per month on regularly assigned watches for the 12-hour men and 8-hour men, but they did not always get the same amount of money.

Mr. Booth. Q. But the 12-hour men worked more hours per month than the 8-hour men did and consequently their hourly earnings were less than those of the 8-hour men. Isn't that correct?

A. Under the old agreement that is correct, and that also was the cause, or one of the principal points before the Arbitration Board, and that was the reason for the arbitration.

Q. Yes, that there was an inequality there?

A. Yes."

The union went before the Board complaining not only that the 12-24 hour watches were unduly arduous and also making the fanciful claim that those hours were hazardous to safe operation when it is a matter of common knowledge that a serious accident has not occurred in appellees' ferry service for a generation, but they also stressed before the Board, as shown above, that while the 12-24 hour men were getting the same amount per month—for a less number of watches—than the 8-16 hour men, they were because of the greater number of hours of service on each watch during the month getting less money per hour.

Unsatisfied with the rectification of that condition by all assigned watches being put on the 8-16 hour basis, the same union now seeks to recover, during the six-months period when the carriers had moral and legal right to test the award, an 18% differential *per*

hour in favor of the 12-24 hour men against the 8-16 hour men.

Yet, counsel insist, these are suits in equity. Nothing more inequitable could be imagined in a wage controversy.

As stated, there are two classes of claims involved —those based on "full monthly assignments" where 20 or 21 watches per month were worked, and those based on broken monthly assignments where less than the 20 or 21 watches were worked. These are shown in detail in Plffs. Exs. 8-a and 8-b and summarized in the following exhibit:

(Defts. Ex. G, witness Gorman, R. p. 309.)

Analysis and comparison of full monthly and broken monthly assignments.

Southern Pacific Co. (Plaintiff's Ex. 8a)

	(1) No. of full monthly assignments worked at 12 hours each.	(2) No. of broken monthly assignments worked at 12 hours each	(3) Total number of 12 hour watches in broken monthly assignments —Col. 2
Firemen	294	153	2248
Deckhands	812	288	3941

Northwestern Pacific R. R. (Plaintiff's Ex. 8b)

Firemen and Deckhands	116	60	914

Note: For definition of broken assignment See Note to Rule 1 of 1925 Agreement—Plaintiff's Ex. 2. That note was not changed by the Arbitration Board."

As already shown the man who worked the 20 or 21 watches during a full month was paid the monthly pay as increased by the award. His overtime was paid in the final adjustment.

The basis of pay for the "broken assignment man" —both during the six months and on final adjustment are shown by another exhibit as follows:

(Witness Gorman, R. p. 307.)

12-24, FIREMAN—RATES OF PAY, MCH. 1-AUG. 31, 1928
Showing rates originally paid and Rates used in adjustment of Sept. 1928.

COL. A Broken Assignments	COL. B.
Rates paid before Sept. Adjustment	Rates used in Sept. adjustment
The monthly rate was $146.35	The monthly rate was $146.35
Daily rate for 8 hour day—21 watches	Daily rate $5.6109
21 12-hr. watches= 31-½ 8-hr. days	146.35 x 12 months= $1756.20 divided by 313 working days
*$145.35 ÷ 31-½= $4.646	This formula prescribed by Rule 2 (a) of the agreement, and is the same daily rate as paid to 8-16 hr. firemen.
Daily rate for 8 hr. day—20 watches	Hourly rate ..... $.7014
20 12-hr. watches = 30 8-hr. days	$146.35 x 12 months = $1756.20
$146.35 ÷ 30 = $4.8783	divided by 2504 hrs. the no. of hours in 313 8-hr. working days is formula prescribed by Rule 9 (a) of agreement and is same hourly rate paid to 8-16 hour firemen.
Hourly rate—arrived at under Rule 9 of agreement—12 months x $146.35= $1756.20	
divided by 2920 hrs. (or 8 x 365) = $.6014	

*Misprint for $146.35.

It follows that the "broken assignment" men by the final adjustment were paid full 8-16 hour watch rates as found by the trial Court.

Another error in which appellants persist and a fallacy that underlies their entire claim consists, basi-

cally, in ignoring the provision that existed in Rule 6 of the original contract and in Rule 6 of that contract as amended by the award that the "8-16 hour" men who worked on "assigned crews" were not merely to work 8 hours on watch and then 16 hours off watch but that they were to work "eight hours or less *each day for six consecutive days*", and that the same requirement for 8-16 hour men was continued in effect by the arbitration board.

That fallacy was clearly perceived and expressed by the trial judge. His discussion in his opinion (R. pp. 99-104) emphasizes the contractual necessity for an 8-16 hour assigned watch to be *eight hours per day for six consecutive days.* The thought is re-inforced by his special findings. (See Finding II, R. pp. 119 and 120 and Finding IX, pp. 127 and 128.)

The terms of the written agreement of 1925 between the men, represented by the union, and the railroad are undisputed. The agreement is Exhibit A to the answer (R. p. 68) and was received as Plffs. Ex. 2. (R. p. 146.) The arbitration award is embodied in the judgment and may be found at pages 24-34 of the record.

The arbitrators did not re-draft the contract; certain sections and certain sections only were before them in the agreement to arbitrate (R. pp. 81-87) as "specific questions submitted to the board for decision." (Para. "Fourth", R. p. 82.)

The award, therefore, operated only as an amendment of the original agreement of 1925; it left untouched and in full force and effect all of the sections of that agreement not specifically amended by the

award. Under familiar principles the agreement of 1925 as so amended by the award must be construed as a whole to determine what rights were created as well as what rights were preserved by the award.

The appellants blandly ignore the fact that under the agreement of 1925 as amended by the award the monthly pay of $146.35 for firemen and $139.40 for deckhands who worked on regular assigned watches was for a service of eight hours per day for six consecutive days, whereas their assignors did not work six consecutive days at any time.

In other words, to entitle a man on an assigned crew to a months pay under the agreement of 1925 as amended by the board, he had to comply with Rule 6 which reads, as amended:

> "Rule 6: Assigned crews will work on the basis of eight hours or less on watch each day for six consecutive days."

Thus the 8-16 hour men who continued on those assigned watches during the six calendar months in question or during any of those calendar months worked either 26 or 27 eight hour watches each month depending on the number of days in the month. (Defts. Ex. F, R. p. 258.)

But the 12-24 hour man—and all of appellant's assignors are of that class—who worked one or more calendar months during that period only worked 20 or 21 twelve hour watches a month. (Defts. Ex. F, R. p. 258.) The calculation is of a mathematical certainty; no exhibit was necessary but one was received (Ex. F ante) in the interest of clarity.

The 8-16 hour man received his monthly wage for 26 or 27 eight hour watches during that period. The 12-24 hour men received the same monthly wage for their 20 or 21 twelve hour watches, but—by their method of computation they want to credit the carrier with the monthly wage for the first eight hours only of each of those 20 or 21 watches when the 8-16 hour men worked 26 or 27 watches for the same monthly wage; then the appellants want four hours overtime for each of those 20 or 21 watches. That is where the plaintiffs' assignors gain the 18% differential over the 8-16 hour men that we reviewed earlier in this chapter, and is absolutely against the spirit of the award as well as contrary to its text.

There was no 12-24 hour assigned watch left in Rule 6 when the Board got through with that rule. But its award was in suspense during the impeachment proceedings. The result of the final affirmance of the award was by the stipulation made retroactive to March 1, 1928; it follows that for the purpose of the final adjustment in October, 1928, those 12-24 hour assignors to the appellant were required to be treated as having worked during the six months without any rule in the Agreement of 1925 as amended that provided for a 12-24 hour watch. During those six months the 12-24 hour men were paid currently the monthly wages as increased by the award where the 20 or 21 twelve hour watches were worked in a calendar month, and, on broken assignments a daily wage was paid computed on the 12-24 hour watch basis as illustrated in the table on R. p. 307. (See table in Finding XIII, reproduced *ante*.) It was well understood by them that if the award was upheld "the retroactive

date of the new watch rules which are a part of that award shall be advanced from November 1, 1927, to March 1, 1928." (Stipulation, copied into Judgment, R. p. 29.) If the award had not been upheld they would have been fully paid during those six months.

They had "bid in" for these 12 hour watches (Deal, R. p. 289)—"bidding in" being a well recognized term in labor contracts to describe the preference senior men may exercise for vacancies that occur in positions. They were not employed from day to day; "the 12 and 24 hour boats kept running until about September 1st". (Deal, R. p. 289.)

How then could it be expected that in adjusting their pay for the six months of March-August, 1928, they would be paid on any other basis than the 8-16 hour men? The rule abolishing 12-24 hour watches was then, by stipulation, retroactive to March 1, 1928. Those 8 hour men had given 26 or 27 eight hour days for a month's pay. Why should the company pay the 12-24 hour men a month's pay for 20 or 21 eight hour watches plus pay at the hourly rate for 80 or 84 hours overtime?

Appellants attempt to justify this by Rule 8 which was not changed by the award. At all times Rule 8 read that the monthly salary covered *"the present recognized straight time assignment"*, and that overtime was *"service hourage in excess of the present recognized straight time assignment"*. Appellants' argument under Rule 8 is self-destructive because the only "present recognized straight time assignment" *in the agreement of 1925 as amended by the award* was the 8-16 hour assignment under Rule

6 as amended which required eight hours or less on watch each day "for six consecutive days" and none of plaintiff's assignors worked six consecutive days.

It was impossible to apply Rule 8 to the 12-24 hour men who had worked during that six months. They were not, in any sense, 8-16 hour men and the testimony and argument that 8-16 hour men were always paid overtime for hourage over 8 hours in any one day has no bearing at all on the claimed obligation of the company to treat each 12 hour watch as a unit consisting of one 8 hour day and 4 hours overtime regardless of the fact that the man, under that construction would receive a month's pay for 20 or 21 eight hour periods. The trial judge saw the injustice and lack of equality in such a result, as his opinion and findings show. Moreover, when the method of actual payment had been explained to him he saw and found that the plaintiff's assignors had received exactly the same pay per eight hour day and per hour worked as the 8-16 hour men.

In this connection we ask the Court to examine the tables in Findings XII, XIII, XIV and XV (R. pp. 131-134), also one of the tabulations in the opinion (R. p. 108) which does not appear in the findings. The tables just referred to summarize the defendants' testimony and show that the amounts paid each of the plaintiff's assignors prior to the final adjustment check, plus that check, gave him exactly the money he would have received if he had been on a regular assigned 8-16 hour watch, but had worked the same number of twelve hour watches he actually worked as a 12-24 hour man.

III.

THE "HANCOCK FORMULA" SO CALLED BY APPELLANTS' BRIEF WAS NECESSARY, SIMPLE, FAIR AND COMPLIED WITH THE AWARD.

That formula is reproduced in Finding V (R. pp. 123-6) and in evidence as Defendants' Exhibit A. (R. pp. 220-2.) Witnesses Hancock (R. pp. 223-6; 241-2; 247-51) and Gorman (R. pp. 252-269) testified orally before the trial judge and, to the extent that their testimony or explanations may differ from that of witness Deal, the secretary and manager of the union, we believe that on this appeal the findings based on their testimony should stand.

The situation was that under the agreement of arbitration the award of the Board as to rules was to be effective "on the first day of the month following the date on which the award was filed". (Arbitration Agreement, Sec. 11, R. p. 86.) The award was filed October 31, 1927 (Judgment, R. p. 24), and normally the new watch rules would have taken effect on November 1, 1927, as agreed to. (R. p. 24.) But the carriers desired to and did on November 9, 1927 (R. p. 28), file a petition to impeach the award, a privilege granted them by Section 9 of the Railway Labor Act and the petition being denied on February 9, 1928 (R. p. 28), by the District Court, they appealed to this Court. That petition for impeachment and appeal resulted in a preservation of the *status quo*. Pending the appeal and to adjust that situation on May 19, 1928 (R. p. 28) the carriers and the union stipulated in the proceeding (Stipulation, R. p. 28)

(1) that the $10 per month increase should be paid beginning May 1, 1928, to April 1, 1929, and thereafter until the contracts were modified; and (2) that the $10 increase should be retroactively paid to January 1, 1927. It is not claimed that this increase was not paid in accordance with the stipulation. Each of plaintiffs' assignors as well as the 8-16 hour men received that increase. (Finding IV; R. p. 123—unchallenged.) But the stipulation proceeded further and provided (3) (R. p. 29) that if the District Court's decree was affirmed "the retroactive date of the new watch rules which are a part of that award shall be advanced from November 1, 1927"—the date when they would have taken effect but for the petition and appeal—"to March 1, 1928". Such a stipulation was permissible under subdivision "fourth" of Section 9 of the Railway Labor Act.

The "new watch rules" referred to established the 8-16 hour watch as the only regular assigned watch. Counsel admit (Brief, p. 25, line a) that "Under the award and judgment the men were entitled to a monthly wage based on "8 hours or less on watch for *six consecutive days*" and further quote the amended Rule 6 to support that statement.

During that six months' period the 12-24 hour men continued to work on their 12-24 hour assigned watches because no one knew whether the award would finally be affirmed. They were working under the, as yet, unmodified contract which in Section 6 specifically provided for 12-24 hour assigned watches. Those of them who worked each 12-24 hour watch during a calendar month received currently a full month's

pay at the increased rate. (Finding XII, R. p. 131.) There is no dispute as to that. Those 12-24 hour men who worked on "broken assignments"—that is less than the 20 or 21 "12-24 hour" watches that constituted a full month—were paid currently at the "12-24 hour" daily or hourly rate. (See Gorman's testimony as to Fireman Leimar (R. p. 254); also table in Finding XIV (R. p. 133), illustrating Leimar's basis of pay before the final adjustment. Also see Gorman's testimony at pp. 306-7.) If the award had been set aside by direction of this Court to the District Court, there would have been no occasion to make any adjustment with plaintiffs' assignors, because the 12-24 hour watch would have remained in effect and they had been fully paid on that basis, plus the $10 increase, each month during the six months here involved.

When it became the duty of the management, represented by Mr. Hancock, to make the adjustment after final judgment, he had before him paragraph 3 of the stipulation providing in effect that adjustment should be made as though the *exclusive* 8-16 hour assigned watch had been in effect during the six months period and as though no 12-24 hour assigned watch had then been in effect. But the 8-16 hour watch provided for "six consecutive days" work as well as for 26 or 27 eight hour watches per month, while the 12-24 hour men whose wages he was adjusting for the six months, retroactively, had worked on the basis of an assigned watch that produced only 20 or 21 watches per month and none of them had worked six consecutive days.

Accordingly, he provided in the formula (R. p. 221, also Finding V, R. p. 124) that:

> "Employes who served on twelve (12) hour watch assignments (56-hour week) are entitled to the benefits of forty-eight (48) hour week, in way of additional compensation, commencing with March 1st, 1928. That is (except on Fire Boats where there is no change), they should receive the same compensation as would have accrued to eight (8) and sixteen (16) hour assigned men, working the same number of hours."

And the remainder of the formula was devised to produce exactly that result. The tables in the opinion and the findings and Defendants' Exhibits D (R. p. 255) and F (R. pp. 258-9) as well as the Hancock and Gorman testimony above referred to show that conclusively.

Referring again to those tables:

There are but two classes of 12-24 hour men involved—those who worked all of the 20 or 21 assigned watches per month and those who worked less than that number, i. e., "broken assignments".

The trial Court correctly found (Finding X, R. p. 129) "that under the adjustment made by the formula the hourly and daily rate of compensation of the 12 and 24 hour men was exactly the same as that of the 8 and 16 hour men".

The essential weakness in appellants' argument is that they insist that a 12-24 man who worked but 20 or 21 watches per month was entitled to the same monthly salary for the first eight hours of those 20 or 21 watches as that paid an 8-16 hour man for 26

or 27, eight hour watches during the same month and was entitled in addition thereto to four hours overtime for each 12 hour watch.

What the carrier did by the final adjustment was to pay the 12-24 hour man enough so that his total pay *for each month* during the six months equalled the eight hour daily pay of an 8-16 hour man for the first 8 hours of each 12 hour watch, plus four hours overtime at the 8-16 hour man's rate for the remaining four hours.

In other words, in the case of a 12-24 hour fireman the final adjustment resulted in his being paid $5.6109 —the daily rate for an 8-16 hour fireman—for the first 8 hours of each 12 hour watch he worked plus $.7014— the hourly rate for the 8-16 hour fireman—for each of the remaining four hours of each 12 hour watch he worked. This is demonstrated by the tables in the findings. (R. pp. 131 et seq.) It is attacked on the "daily unit" theory which, as we show elsewhere, would result in an 18% + hourly differential between the two classes of men and in favor of the 12-24 men, when, as we further show and as the Court found, one of the objects of the arbitration was to equalize the hourly pay of the two classes.

IV.

CORRECTION OF SOME MISSTATEMENTS IN APPELLANTS' BRIEF.

The appellants' brief is so pervaded by misstatements and misapplication of the rules that to answer it in detail would almost require the analysis of each sentence. We call attention to a few of the outstanding distortions of the record.

On page 26 it is incorrectly stated that the award is

> "that the men get a monthly salary which covers the straight time of eight hours, and 'in addition to the monthly salary' (to use the words of Rule 8) to be paid for all hourage in excess of eight at the pro rata rate."

Rule 8 was unchanged by the Board of Arbitration; it says nothing about 8 hours. Rule 8 (R. p. 72) provides that "service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate". It must be read in connection with the *amended Rule 6,* which by stipulation was made *retroactive* during the six months in question, and under which there was but one recognized straight time assignment, namely, not less than 8 hours per day for six consecutive days. The plaintiffs' assignors were not on any such assignment; they were on a 12-24 hour basis, which was a "recognized straight time assignment" during those six months; therefore the rule is against counsel rather than in favor of them.

On page 26 they quote Mr. Hancock's testimony as sustaining their statement "It has always been

the practice to pay overtime for hourage in excess of 8 hour watches", but the very quotation they make shows that Mr. Hancock said (R. p. 242):

> "If a man's regular assigned hours were eight hours and he worked in excess of that, unless it was provided for in an agreement, he would receive overtime at a pro rata rate."

The "regular assigned hours" of plaintiffs' assignors were twelve hours—not eight hours.

The testimony on this subject is so clear and uncontradicted that it is surprising to find counsel attempting to give the Court the impression that any overtime was ever paid for hours worked in excess of eight except to men working on a regular assigned 8-16 hour watch which as defined by Rule 6 (both before and after the award) was to be eight hours or less for six consecutive days.

Appellants' counsel are under no illusion as to this whatever may be the inference they seek to have the Court draw from their brief. We quote from the cross-examination of Mr. Hancock as condensed in the record (p. 248):

> "Mr. Sharp called the attention of the witness to his testimony that it has been the uniform rule and practice since 1918 to date that where a man is assigned on an 8-hour watch, but as a matter of fact on any particular day he works in excess of 8 hours, he is entitled to overtime for that excess at a prorate basis, and asked whether that meant an 8-hour regular assigned watch. The witness replied: 'I mean or had reference to an eight hour watch that was a part of the regular eight hour assignment. In other words a man—

or the assignment upon which the man served was that normally for 6 days a week. Now, you will remember that in the case before us these men did not work every day of the week'. If his regular assigned watch was exactly eight hours and he worked in excess of eight hours, then he would receive overtime at the prorate rate for the excess time worked. So that if on a particular day a man is assigned to an eight hour watch and works, say, nine hours, he is entitled to one hour overtime at the rate of 7014 and by the same token, if that man was on an eight hour, 6 day assigned watch and worked 12 hours, he is entitled to four hours overtime, if he was on an assignment of that kind, a daily assignment. Where a man is assigned to an 8-hour watch, each hour he works in excess of 8 hours is overtime, where it was a part of an assignment of 6 days per week.

The men were assigned on the 12 and 24 hour basis during the period the case was in court and the men were assigned to those watches by the company. All the men involved in this controversy were during the period in controversy assigned by the company to work on the 12 hour watches in the number set out in the exhibit. The men bid in the 12-hour watches and were so assigned to them. But the company assigned the watches. During the entire period in controversy the men worked on 12-hour watches which were assigned by the company." (Meaning by the last sentence that the *boats* operating on the 12-24 hour watch basis were designated by the company.)

On page 27 of appellants' brief it is said:

"The rule provides that the monthly salary shall be for the assigned time, and the testimony

> is without conflict that it was the company that made this assignment (R. p. 249), and that was the full assignment made by the company. If the company chose to assign these particular men on a system of watches which in effect required the men to work only 21 watches instead of twenty-five, twenty-six or twenty-seven watches a month, that was the company's doing, not the men's doing."

But under the amended contract there was only one class of straight time assignment provided for; that was by the amended Rule 6, which provided for 8 hours or less per day for 6 consecutive days and that under the amended contract is the only straight time assignment to which the monthly salary applies. There is no provision made in the amended contract for applying the increased monthly salary to 12-24 hour watches because those watches are not provided for in the agreement as amended by the award except in certain exceptions to Rule 6 which are not applicable here.

Counsel ignore the fact that for many years and until September 1, 1928 there were two classes of boats —those operated on the basis of 8-16 hour watches and those on the basis of 12-24 hour watches. The men on the second class of boats had "bid in" for their 12-24 hour assignments (Deal, R. p. 289; Hancock, R. p. 249)—that is, because of their seniority under Rule 17 of their agreement (R. p. 74) they were entitled to and had exercised the preference of filling vacancies in these "barbarous" 12-24 watches when such vacancies were bulletined under Rule 14. (R. p. 73.) Thus the

men had "assigned" themselves to the "inhuman" 12-24 hour watches prior to the award and merely continued to work on them during the six months in question because the watches on those boats were not readjusted to the 8-16 hour basis until the final judgment was entered. "The 12 and 24 hour boats kept running until about September 1st." (Deal, R. p. 289.)

We repeat that during the six months in suit the award was in suspense; the old Rule 6 remained in effect. That rule specifically authorized both 12-24 and 8-16 hour watches and Rule 8 provided for overtime only when a man worked more than the 12 hours on a 12-24 hour watch or more than the 8 hours on an 8-16 hour watch. The stipulation made pending appeal to this Court was all that made the amended Rule 6 retroactive during those six months. If an affirmance of the award by this Court would have had that effect by its own force, the stipulation would have been unnecessary. Counsel recognized that by exacting Paragraph 3 of the stipulation as one of the conditions for advancing the effective date of the award from November 1, 1927 to March 1, 1928.

But even if the award, on its final affirmance became retroactive *ex proprio vigore,* it was nevertheless suspended during appeal and 12-24 hour watches were entirely proper.

Counsel then say that the company was "gambling" on the fact that it could continue to work the men on the 12-24 hour watches. The company had the legal and moral right to follow to a conclusion the steps

provided for in the Railway Labor Act and, moreover, it did by the stipulation put the $10 per month increase into effect irrespective of what the subsequent decision of this Court might be. Counsel next claim (p. 28) that the carriers violated their agreement, meaning, we suppose, the arbitration agreement, but the arbitration agreement was entered into under a statute which provided for judicial review and it was no violation of the agreement to preserve the *status quo* until that review could be had. These are lame excuses, indeed, for attempting to apply a monthly rate based on 26 or 27 eight hour watches per month to the first eight hours of each of 20 or 21 watches per month.

The Hancock formula is referred to on page 30 as intricate; in reality, as we show in Chapter III, ante, it was a very simple formula and was designed to and did give the 12-24 hour men on the final adjustment just what the 8-16 hour men would have received had they worked the same number of watches and the same number of hours on each watch as the 12-24 hour men.

It is said on page 31 that we admit that the formula did not pay "overtime" for the last four hours of the 12 hour watch. But whether the payment was called overtime or additional compensation would seem to make no difference; the fact remains that the 12-24 hour men for the six months in question got exactly what they would have received if they had been paid the 8-16 hour daily rate for the first 8 hours of the watch and the 8-16 hour overtime rate for the other

4 hours. We show that over and over again in this brief and the trial Court so found. (Finding XI, R. p. 130.)

The argument in parallel columns on page 34 is incorrect in important respects. The left-hand column entitled "What the Judgment gave the Men" assumes that each 12-24 hour watch consisted of "8 hours straight time covered by the monthly salary and 4 hours overtime". That is not true, as we have shown, and therein lies the fallacy of the entire table, which consists in assuming that the 12-24 hour man was entitled to the amended contract monthly salary, for the first eight hours of each of 20 or 21 watches a month, when that monthly salary, under the amended contract, applied only to an assigned man working 26 or 27 eight-hour watches. Plaintiffs' assignors did not work that many watches in a calendar month and therefore it is incorrect to start the table on page 34 with the assumption that the 20 or 21 watches should be compensated for on a basis applicable only to 26 or 27 watches, namely, the monthly basis. They persist in this error by saying on page 35 that under Rule 8 the monthly rate covers straight time "that is to say the 8-hour portion of assigned watches". We have already shown that it covers only assigned watches provided by the amended contract and there was but one assigned watch provided for by that contract, namely, 8 hours or less per day for six consecutive days, a watch that none of plaintiffs' assignors worked during any month.

If counsel say that our analysis of counsel's table on their page 34 is incorrect, then they must admit that for the first 8 hours of each 12 hour watch the 12-24 man was entitled to receive the daily pay of the 8-16 hour man, which in the case of a fireman was $5.6109 (deckhands are exactly comparable except for the amount), and that amount was by the final adjustment actually paid for the first 8 hours of each 12 hour watch as shown by the findings and the table therein.

Again, counsel say on page 38 that we worked men in violation of Rule 6,—we suppose Rule 6 as amended by the award. But there was no *amended* Rule 6 in practical and operating effect until the award was finally affirmed by the District Court on direction of this Court, and while these men were continuing to work on the 12-24 hour watches for which they had expressed preference by "bidding" they were working under a contract that specifically provided for those watches.

Again, on page 39 they revert to their argument that the "formula did not pay overtime for the last 4 hours of each 12 hour watch *as such*". We have shown, and the evidence is conclusive on the subject, that the men, plaintiffs' assignors, were paid an amount which included the same amount that would have been paid for those 4 hours if we had paid the first 8 hours on the daily 8-16 rate and the last 4 hours on the hourly 8-16 overtime rate.

Point 3 on page 42 of the brief takes up some remarks by defendants' witnesses and counsel and en-

deavors to give the impression that no man was paid overtime until he had worked 48 hours in a week. But Mr. Hancock's testimony quoted by counsel means merely that in arriving at the basis of the final judgment it was considered that where a man had worked an entire month 48 hours per week were covered by the monthly salary. That is all that means and nothing more. This is shown clearly by the Conrad Anderson case where Anderson worked only one 12 hour watch in August, 1928. (Table, Finding VIII p. 132.) He was paid by the final adjustment $8.41 for that watch, which was equal to one day at $5.6109 —the 8-16 hour daily rate—plus 4 hours overtime at .7014 per hour, the 8-16 hourly or overtime rate. It is further shown on the succeeding table in Finding XIV (R. p. 133) in the case of fireman Leimar, who in April, 1928, worked but one watch and received by the final adjustment $8.40, arrived at in the same way as in the one watch of Conrad Anderson. The question of overtime for hours or parts of hours on watches worked in excess of 12 hours is not involved in the case. That is admitted. (R. bot. p. 25.)

The foregoing are but a few of the many misapplications of rules and testimony that occur in appellants' brief. These no doubt were brought about by the exigency of trying to show that these men should receive credit for a full month's pay for the first 8 hours of but 20 or 21 eight hour periods of duty during the month and that they should have a pay adjustment that would give them an 18% differential over the 8-16 hour men who were working in the same class of service at the same time 26 or 27 eight hour watches for six consecutive days each week.

V.

PLAINTIFFS' LACHES SHOULD BAR RECOVERY.

Appellants are insistent that their proceedings against each of the appellees are in equity. Equity does not countenance stale demands and lack of reasonable diligence. (21 *Corpus Juris,* p. 212, para. 212.) And yet—to quote from the opinion of the trial Court (R. p. 111):

> "The checks were dated September 30, 1928. On January 9, 1929, counsel for the union made written demand upon the carriers for payment of additional overtime as contended for herein. On October 2, 1931, the employes assigned to the union all claims due them from the carriers, expressly including the claims for wages 'from March 1, 1928, to and including December 1, 1928', and all rights which assignors had by reason of the judgment of this Court entered on September 29, 1928. It was not until September 27, 1933, that these proceedings were commenced, *two days short of five years after entry of judgment, a delay suggestive of laches.*"

The written demand referred to was in the form of letters dated January 9, 1929, more than two months after the overtime checks were cashed. The letters appear at pages 193-199 of the record. They contain no offer to restore or repay all or any part of the moneys which according to the endorsements on the checks were receipted for "as an acknowledgment of receipt of payment in full of account as stated within". (S. P. check, R. p. 229; N. W. P. check, R. p. 230.)

The carriers' replies were by letters January 17, 1929 (R. p. 200) and January 22, 1929 (R. p. 201), respectively, which unequivocally stated that the award had been fully complied with.

Not until September 27, 1933, almost five years after the checks were cashed, did the union belatedly attempt to assert its supposed rights as assignee on the equity side of the Federal Court by the three proceedings described in Finding VII. (R. p. 126.)

Nor should it matter that action was brought in the State Court for the amounts involved in the instant case, although there is no evidence in the record before this Court that such an action was brought. Counsel say—gratuitously—on page 4 that they sued in the State Superior Court and that "that court erroneously refused to take jurisdiction on the ground federal legislation was involved"; further (Brief, p. 20) that the Superior Court "decision was affirmed by the District Court of Appeal but set aside by the Supreme Court of the State of California where it is still pending". Parenthetically—if we may be permitted the same extra-record liberties that counsel take—the union filed a bill in equity in the Superior Court on March 6, 1931 and changed it to an action at law by amended and supplemental complaint filed October 29, 1931. But resort to the State Court and pursuit of a supposed remedy at law therein aggravated rather than palliated or excused the manifest laches in the union's failure to pursue its supposed remedy or remedies on the equity side of the Federal Court for nearly five years after its assignors received and cashed their overtime checks.

Interest.

Appellant proceeds on the equity side of the Court and asks, not only for additional payments for overtime, but also for interest. Interest is allowed in equity as a matter of discretion, not of right.

Certainly, even if, as the trial Court strongly intimated and as we believe, the plaintiff's laches has not barred it from relief in equity—and it is that form of relief to which its pleadings bind it—equity should not, in view of the great delay, penalize it with interest if this Court should find it entitled to judgment for the principal of the additional payments it seeks. Even that recovery, as we elsewhere endeavor to show, lacks any support in the evidence or in law.

VI.

THE FINAL JUDGMENT AFFIRMING THE AWARD WAS NOT A LIQUIDATED DEMAND IN FAVOR OF THE UNION, AND THERE WAS NO JUDGMENT THAT COULD BE SATISFIED BY THE UNION.

Partly in support of their position that these are suits or actions on the judgment and partly to claim that there could be no accord unless the union was a party to it the appellants claim that the judgment was a "liquidated demand" and that it was in favor of the union.

Neither position is correct. The Railway Labor Act of 1926 provides a system of collective bargaining by employes, by classes, through representatives chosen

by a majority of the class. The representative—in this case the union—is merely an agent or attorney in fact. The agent has no proprietary interest in the fruits of the bargain; he represents the minority which did not vote to select him as well as the majority which did. That is made plain by the Chief Justice in *Texas and New Orleans R. R. v. Brotherhood etc.,* 281 U. S. 548, on page 570, the first authoritative construction of the Railway Labor Act of 1926.

That act was amended in 1934 and as amended is printed in the loose-leaf supplement to Title 45, U. S. Code, Ann. The original act is 44 Stat. 579, Title 45 U. S. Code, 1928 ed. Chapter 8, Sections 151 et seq. Throughout the act the theory is carried out of classes of employes dealing through "representatives" of their own selection; the representative may be an individual or as in the case at bar an unincorporated association. When the act came to its provisions for arbitration it provided (Section 8, 44 Stat. 584) that the agreement "shall be signed by the duly accredited representatives of the carrier or carriers and the employes".

That section was strictly followed in the instant case. The agreement to arbitrate (R. p. 81) was made between the carriers "and the marine firemen, deckhands * * * as *represented* by the Ferryboatmen's Union of California". That representative could have no financial or proprietary interest in the monthly wages or in pay for overtime. It might acquire such interest by assignment—as it did subsequent to the final judgment—but its legal position as assignee is no different from that of an assignee for value or an

assignee for collection. Under the Railway Labor Act a carrier is "open shop" but a mere majority of the employes of a given class may constitute a Brotherhood or union the representative of all of that class. That is the very heart of the principle of collective bargaining.

The union did not institute a suit against the carriers to have the award made final. The finality would have been automatic under Section 9 of the act (Section 159, T. 45, U. S. Code, unchanged by Amendments of 1934) had it not been for the petition filed by the carriers under Section 9 to impeach the award. The proceeding to impeach was entitled *in rem.* (R. p. 1.) The union merely acted as the employe's representative in that proceeding and in the appeal to this Court. It acted for all employes of the classes affected—its own members as well as non-members. It did not become a plaintiff until on September 25, 1933, it filed the three pleadings in the District Court here under review. (R. pp. 1-11-336.)

As the result of the appeal came the final judgment (R. pp. 23 et seq.) affirming the award.

We ask the Court to read Section 9 of the act (Section 159, Title 45, U. S. Code) and then read the *Texas and New Orleans* case, supra (281 U. S. 485), and the opinion of the Circuit Court of Appeals of the Fourth Circuit in *Malone v. Gardner* (1932), 62 Fed. (2d) 15. From them the conclusion cannot be escaped that the judicial proceedings permitted by Section 9 of the act are unknown to the common law and to equity; that they are of a special character and that the jurisdiction of the Court is very strictly

limited. It cannot affirm a separable part of the award and reject another separable part. It must either affirm or annul the award as an entirety. (Section 9, Subd. "Fourth".) The scope of the proceeding is strictly limited by subds. third and fourth of Section 9.

We think that it must follow that the portions of the final judgment directing payment "of all overtime due or to become due in accordance with said Rule 8" (R. p. 33) and to pay "all back pay retroactively or otherwise due to said employes or any of them in accordance with said award and this judgment" (R. p. 34) are merely surplusage, and that the rights of the employes to additional pay for the services rendered March *to* September, 1928, once the award had been judicially affirmed under Section 9, were based entirely on and flowed exclusively from the Agreement of 1925 as amended by the award and as retroactive to March 1, 1928, only, as stipulated to pending appeal by the employers and the representative of the employes. These rights were individual to each employe. The Railway Labor Act nowhere authorizes the employes' representative to *collect* wages and there is nothing in the record to show that the employes had delegated that right to the union.

Counsel lay great stress on the statement of the Chief Justice on page 564 of the *Texas & New Orleans Railroad Co.* case (281 U. S. 548) that "Thus it is contemplated that the proceedings for the amicable adjustment of disputes will have an appropriate termination in a binding adjudication, enforceable as such," which is qualified by the subsequent statement on page

569, after, referring among other things to arbitral awards, that "in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each".

The Chief Justice did not hold that the impeachment proceedings were in equity or that judgments affirming awards were decrees in equity or judgments at law. While giving complete finality to an award which had been affirmed by judgment—either as the result of or without impeachment proceedings—he assumed, no doubt, that aggrieved parties would resort to the proper forum and adopt the proper procedure for asserting and enforcing their rights.

But if the portions of the judgment above quoted be treated as valid they merely run in favor of the individual employes as their interests might appear under the award and stipulation.

The judgment did not constitute a "liquidated demand" in the sense of being a money judgment.

"To liquidate a claim is to determine by agreement or litigation the precise amount of it" said District Judge Sibley *In re Cook,* 298 Fed. 125-6, quoting Webster's International Dictionary and Bouvier's Law Dictionary.

Appellants themselves recognized this in the trio of instant proceedings which are, a motion for reference to a commissioner to ascertain the amounts due, an ancillary bill in equity to enforce decree and an original bill in equity to enforce decree.

And if there was a judgment in either liquidated or unliquidated form in favor of the union why did

the union find it necessary to take assignments from the 12-24 hour men? (Complaint, par. II, R. p. 21.)

Even treating the judgment as in all of its parts *fully* effective and mandatory, the trial Court correctly found (Finding XVIII, R. p. 136):

> "The judgment was not a liquidated demand but necessitated an interpretation of the award. The judgment was not one for which the union could enter satisfaction of record, as the individual employes were the actual judgment creditors of the company."

The necessity for many pages of evidence, exhibits and argument to set forth the respective contentions of the men and the carriers as to this back-pay is the best evidence that the final judgment did not create a *liquidated* demand in favor of any one—least of all the Union.

We think the conclusion inescapable that the union is suing merely as assignee of certain unliquidated claims under the amended contract and stipulation, and that its assignors had full competency prior to that assignment to enter into an accord and satisfaction or execute a release of those claims—the amount of which—as we show in the next chapter—was in dispute through their authorized representative.

VII.

DEFENSES OF ACCORD AND SATISFACTION AND RELEASE.

In their answers in the several proceedings defendants specially pleaded the defense of "accord and satisfaction" as well as a "release". (Southern Pacific Answer, R. pp. 39-91; Northwestern Pac., R. p. 91.) The trial court found "there was a dispute concerning the amount due and that payment was accepted in full satisfaction thereof. * * * The facts and circumstances are sufficient to sustain the defense of the carriers of an accord and satisfaction and of a release". (R. p. 137.)

Whether there was a dispute was primarily a question of fact for the trial Court to determine. The cases cited in appellants' brief (p. 54) so hold. (*Lapp-Gifford Co. v. Muscovy Water Co.,* 166 Cal. 25, 27; *Berger v. Lane,* 190 Cal. 443-452; *B & W Engineering Company v. Beam,* 23 Cal. App. 164-171.)

The Court saw and heard the witnesses and was justified in finding that before the final checks were issued Mr. Deal had demanded payment on the theory sued upon. Even Mr. Deal admitted:

> "I approached Mr. Hancock and told him that in my opinion that for each 12-hour watch worked the men were entitled to 4 hours' overtime. * * * (R. p. 205.)
>
> Q. Now do you recall whether or not any one representing any of the organizations made the statement at one of these meetings that the Ferryboatmen believed they could collect 4 hours' overtime for each day on which they worked 12 hours?

A. I remember quite distinctly making that statement myself. (R. p. 214.) * * *

Q. Didn't Mr. Hancock say we did not agree to that?

A. I don't recall. He may have said that. I do not recall him saying that at all. I think Mr. Hancock's attitude was always this, and I think it is possibly a very fair attitude, that 'We will pay the men what we think they are entitled to what the award says they should be paid, and if there is anything wrong we will take it up afterwards, as we have done in the past'. I think that was the sum and substance of his statement. And I do know this much, that Mr. Hancock did not care to argue the matter at all. I just got that impression." (R. p. 215.)

Mr. Hancock testified:

"Q. What is your recollection with regard to any claim that was made by Mr. Deal as Secretary and Manager of the Ferryboatmen's Union early in 1928 regarding the claim of the Union that they were entitled to overtime during the 6 months in question here, on the basis now sued on?

A. On several occasions Mr. Deal mentioned that he thought they would be entitled to overtime after the eighth hour for each 13-hour (*should be '12 hour'*) watch that had been worked.

Q. What do you recall about that, if anything?

A. Well, my recollection of it was that I did not see any justification for the claim." (R. pp. 218-219.)

This testimony clearly shows that not once but a number of times Mr. Deal spoke to Mr. Hancock

concerning his theory of payment for the extra four hours. The testimony indicates with equal clearness that Mr. Hancock did not agree with him and plainly shows a dispute between the parties prior to the issuance of the final adjustment checks as to the amounts to be paid; the men having accepted and cashed the checks, all of the elements of an accord and satisfaction were present even under the authority of the decisions cited by appellant on page 54 of his brief. There being a dispute, the acceptance, cashing of the checks and retaining the money makes a clear case of accord and satisfaction; there was a dispute and something less than demanded was offered and accepted. On the reverse side of each check were the following words:

> "Endorse here. This voucher is endorsed as an acknowledgment of receipt of payment in full on account as stated within.....Payee." (R. p. 244.)

The forms of the final adjustment checks are given on pages 228-231 of the record, immediately preceding which will be found (R. pp. 226-7) the following stipulation:

> "Mr. Booth. I have here, if the Court please, photostatic copies of the payroll vouchers as issued, or, rather, a sample of each payroll voucher issued, both from the Southern Pacific Company and the Northwestern Pacific Company and in connection with our defense of payment and also in connection with our defense of *relief* (release) and our defense of accord and satisfaction, I should like to offer these in evidence with the understanding that counsel will stipulate that

all of the plaintiffs' assignors were paid by the respective companies by the same form of payroll voucher, and that they endorsed them on the back over the word 'Payee'. The same is shown on these photostats.

Mr. Sharp. That stipulation will be made, but at the same time I will ask counsel to stipulate further with respect to these checks, that the vouchers used are the customary form of vouchers in use at that time and for many years prior thereto, except that there was printed thereon, on the Southern Pacific checks, the words 'For additional compensation account Arbitration Award between Southern Pacific Company and Ferryboatmen's Union, October 31, 1927, for March to August, 1928, inclusive'; and that the words 'For service as shown on payroll for period indicated herein' were deleted; that with respect to the Northwestern Pacific check, the form is identical with the customary form used, first, except that the words, in rubber stamp, were placed thereon 'August 31, 1928, account wage adjustment'. The rubber stamp was 'Balance due for period March 1, 1928 to August 31, 1928, account wage adjustment'.

Mr. Booth. The stipulation is that the companies took their ordinary forms of payroll voucher and in the case of the Southern Pacific Company they stamped on there what the counsel has read, and in the case of the Northwestern Pacific stamped what counsel has read, thus making what may be argued to be a special form of voucher."

After the sample checks were introduced (R. pp. 228-231) Mr. Hancock, referring to the special en-

dorsements on the faces of the checks relating to the account for which the checks were tendered, as recited by Mr. Sharp, testified:

> "Q. Did you have anything to do with directing these special endorsements to be put on the Southern Pacific vouchers?
>
> A. Yes, sir.
>
> Q. Now, it was prior to that time that you had these conversations with Mr. Deal in which the claim here was asserted and this claim brought out for four hours' overtime on these 12-hour units?
>
> A. Yes, sir.
>
> Q. Will you say whether or not it was because of that attitude on the part of the representative of the men which caused this to be put on the voucher?
>
> A. Yes.
>
> Q. It was?
>
> A. Yes." (R. pp. 231-232.)

As summarized in the record Mr. Hancock said (R. p. 237):

> I did not say they were making claim for overtime on a certain basis. I was given to understand they contemplated making some technical claim and it was for the purpose of forestalling those things that I changed the form of the check. I did not indicate to anyone representing the Union what was in my mind in this respect. I did not tell the Union I thought anything of that kind. I did not tell the Union or its attorneys or any of its representatives why we were *given* (*giving*) checks on a special form.

Mr. Hancock further said on cross-examination (R. p. 234): "These were a special check and issued for the purpose of disposing of the controversy and payment of the compensation that was due under the award." That intention could not have been more plainly expressed when the statements on the front and back of the check are read together. Not one of the men came forward to say he did not so understand it.

While Federal Courts are not bound to follow State Court decisions on principles of general jurisprudence or common law, and particularly in equity cases,* it appears to be well settled in California that when there is a dispute and something less is accepted in full settlement there is an accord and satisfaction.

In *Lapp-Gifford Co. v. Muscovy Water Co.,* 166 Cal. 25, 31, the Court said:

> "It may be accepted as settled law that where a claim is in dispute and the debtor sends or gives the creditor a check for a less sum, which he declares to be in full payment of all demands the recognition thereof by the creditor constitutes an accord and satisfaction."

See also *Berger v. Lane,* supra (190 Cal. 443), citing the *Lapp-Gifford* case and *B. & W. Engineering Co. v. Beam,* supra (23 Cal. App. 164).

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*NOTE: Illustrative authorities are: *Colorado Yule Marble Co. v. Collins* (C. C. A. 8), 230 Fed. 78-81; *Adams Express Co. v. Croninger*, 226 U. S. 401 on p. 504; also 91 A. L. Rep. 743; 71 A. L. Rep. 1109; 57 A. L. Rep. 426. The rule is particularly applicable in Federal equity cases as illustrated by *Russell v. Southard*, 53 U. S. 138-147; *Neves v. Scott*, 54 U. S. 267-272; *James v. Gray* (C. C. A. 1st), 131 Fed. 401-408; *Fee-Crayton Co. v. Richardson-Warren Co.*, 18 Fed. (2d) 617 (cases cited on pp. 622 and 623).

Other jurisdictions go further and hold whether the claim is liquidated or unliquidated, or recovery is doubtful, that any sum of money paid, no matter how small, may form the consideration for an accord and satisfaction. (100 Am. St. Rep. 431; 20 L. R. A. 795, 798, 805.)

In *Swindell v. Youngstown Sheet & Tube Co.* (C. C. A. 6th), 230 Fed. 438, there was a dispute as to the amount due by a licensee for the use of a patent. The check was mailed with an accompanying receipt, and the patentee cashed the check and retained the money, but did not file or return the receipt, which in the opinion is called a "voucher".

The Court says (p. 443):

> "It was open to appellants to reject this offer, but they could not both accept and reject. The language of the check and that of the voucher plainly disclosed a conditional proposal to make a full and final settlement; and this could not be frustrated simply by presenting a new and enlarged account, with a credit thereon of the amount of the check. The retention of the money was an acceptance of the condition upon which it was tendered. The transaction thus comprised the essential and familiar elements of an accord and satisfaction."

The checks given appellants' assignors were cashed, and the money retained without protest.

Mr. Deal's testimony shows that he knew before the checks were cashed that checks were not issued on the basis for which he contended. He testified:

"A. Most assuredly. I knew the men had not received checks to equal that amount. (R. p. 206.) * * *

Mr. Booth. Q. So that these checks—didn't you understand these checks were for what the company contended was the proper allowance to be made for this difference between 8 and 12 hours on these watches?

A. That is correct.

Q. Yes.

A. Not the difference between 8 and 12, I don't understand anything about it, except that these were the checks that were supposed to cover overtime payments, in order to comply with the award and judgment. (R. pp. 209-210.) * * *

A. Well, it was quite obvious, looking at the checks, that I saw, that the 4-hour overtime had not been paid. (R. p. 215.) * * *

Q. * * * The difference was too great to allow of its having been paid?

A. I was quite convinced that it had not been paid, because it should, in my opinion, have been a much larger check." (R. p. 216.)

Mr. Deal further said on rebuttal (R. p. 280) that many of the men took up with him the question of cashing the checks, i. e., before they cashed them.

There is no evidence that the men returned or offered to return the money paid. No demand for an additional sum was made until the letters written by attorneys for the Union dated January 9, 1929; the demand in those letters was promptly rejected on January 17, 1929, by Southern Pacific Company and on January 22, 1929, by the Northwestern Pacific Railroad Company. (R. pp. 193-203.) Neither the men nor

Mr. Deal nor any one on their behalf complied with the company rules in filling out the company form used in cases where underpayment was claimed. (Plaintiffs' Exhibit No. 13.) (R. pp. 244-245.) Nor did they make any complaint or demand on Mr. Gorman to whom complaints in such matters were made by ferryboatmen.

The defenses here discussed were specially pleaded (Southern Pacific answer, R. pp. 58-61; the Northwestern Pacific answer was the same—Stipulation, pp. 336-7.) The plaintiffs sue on claims assigned by the payees of the adjustment checks long after the checks were cashed. Yet they produced no payee to testify that his signature was made through mistake or inadvertence or in ignorance of the effect of what he signed, or was procured through fraud, misrepresentation, duress or undue influence. C. W. Deal, the Secretary and Manager of the Union, saw the checks and admits that he knew they were not large enough to have been prepared on the theory now used as the basis of the instant litigation although he says he had previously advised Mr. Hancock what that theory was.

Moreover, Mr. Deal, Secretary and Manager of the Union, knew before the checks were cashed that the carriers had not agreed to his basis of final adjustment. He said on rebuttal (R. pp. 279-280):

> "When the company issued checks in the form, a sample of which is before the Court, many of the men took up with me the question of cashing the checks.

Q. And what did you do or say to them?

A. I told them to cash them, because——

Mr. Booth. We object to that as not binding upon the defendants here, not having been stated to them. We raised the defense of the checks being tendered in full payment of this account, and they have been acknowledged on the back in full payment of account. Now, I think it is obvious, under the decisions, what Mr. Deal, manager of the Union, said to his men in regard to the men cashing them, that was not communicated to us. I object to this on the ground that it is incompetent, irrelevant and immaterial.

Mr. Sharp. I want to show the exact situation. There was some point made by Mr. Booth, why they happen to use these forms, and I want to bring out by this witness, if I may, that after taking it up with me he was advised that was not necessary, that he could proceed and tell the men to cash them and let the attorneys take up any controversy afterwards and explain the full situation.

Mr. Booth. We object to the relevancy of the statement of counsel. Counsel introduced these forms (*referring to So. Pac. Form admitted as Plffs. Ex. 13, R. p. 245*) and I asked him if any of these forms were ever presented to the company and he said 'no'. (*Referring to Stipulation, top of R. p. 246.*)

The Court. Objection sustained." (*No assignment of error filed, R. p. 323.*)

Much stress is laid on appellees' practice in the matter of adjusting claims on ordinary pay checks. That practice was very frankly stated by counsel for the carriers.

We quote from the record, beginning at page 281:

"Mr. Deal. To the best of my knowledge the statement on the back of the check, Defendants' Exhibit B, 'This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within' has been there for the last 16 years. It was on the back of the checks regarding which I handled claims.

Mr. Sharp. Now in any of those cases was objection made to the treatment of the claim on the ground that the check was endorsed in full?

Mr. Booth. If the Court please, I want to interpose an objection here. Probably it will be argued later. But I object to any evidence as to the custom or practice of the company waiving the benefit of any release on the back of these checks, as irrelevant and immaterial. The fact that a man makes a practice of waiving the statute of limitations in cases, sometimes because it is a matter of good business judgment or comity or good salesmanship, is no bar to his setting up the statute of limitations when it is properly pleaded, and when it is relied on by him and not waived. It is not a question of estoppel in pais; this is a question of special checks and checks in a special form being issued, and the parties signing them and cashing them, and I think we are entitled to rely on this even though we may have waived that in the past as to other checks and other forms of payment.

Mr. Sharp. If the Court please, our contention in this regard would be that over a period of 16 years this identical form of alleged receipt in full has been used; that the men have for years come to rely on the fact that they can cash their

checks and get their bread and butter each pay-day without having to hold the checks up while the lawyers and accounting departments decide on the question of whether or not that is a receipt for payment in full. That has been the uniform procedure; they cash their pay checks, paid their bills, and live on it, and if there are any discrepancies it is straightened out thereafter.* That has been the practice that has continued in years past, and the men took the checks and cashed them, because they knew if there was any discrepancy it could be straightened out afterwards with the company.

The Court. Isn't there evidence in the record already as to that condition obtaining, Mr. Booth? I think some evidence went in without objection.

Mr. Booth. Yes, there is evidence that where time has been omitted from the pay check this form was used and the mistake was rectified. But I do not think that precludes the company from raising the defense, and I think it is not relevant to any claim that the defense has been waived in a wholesale case such as this, where the company puts a special endorsement on the checks and issues them in the face of a prior claim that more money is or may be due, and the checks are cashed. We have a peculiar situation which I think is not disposed of by prior practice. I was perfectly willing to admit what the prior practice is. If a mistake is made in a pay check of any man in the Southern Pacific Company, if he is not credited with enough miles or enough hours, or if a watch is omitted, why, it is always

*NOTE: Rather far fetched. The checks in question were not ordinary pay checks; they were in settlement—as the court found—of a dispute. Many of them were on account of work done several months before the check was tendered.

corrected. (*Note:* See Gorman's testimony, R. pp. 244, 260, 264.)

The Court. No matter what the endorsement is.

Mr. Booth. No matter what the endorsement is on the back of the check. But here is a special situation, and the check is issued in anticipation, as Mr. Hancock testifies to. Now we shall contend on the argument that that can not impair it to any extent by practice in the ordinary course of business. I think any public service corporation, or any other employer, would be, and justly, subject to very severe criticism if it relied on the endorsement of a check, no matter what the language was, if they attempted to preclude a man from opening the account and showing he had not been paid in full.

The Court. The language here referred to is written on the face of the check?

Mr. Booth. Yes.

Mr. Sharp. There is no language on the face of the check which purports to be in full settlement. The language on the face of the check is 'For additional compensation account'.

Mr. Booth. It says 'For additional compensation on account of this award'. 'For additional compensation account of Arbitration Award between Southern Pacific Company and Ferryboatmen's Union, October 31, 1927, from March to August, 1928, inclusive.'

Mr. Sharp. That is the only new language used.

Mr. Booth. And on the back of the check was the endorsement 'This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within'.

The Court. Now, Mr. Sharp, you are seeking to show by this witness what?

Mr. Sharp. I am seeking to show by this witness that as a matter of fact, for many years, regardless of that statement on the back of the check, that the check was in full of account, it has been the uniform practice to permit the men to come in and get adjustments afterwards.

The Court. As I understand it, that is already in evidence before the Court, and Mr. Booth stated that that is the fact.

Mr. Sharp. Then what is the objection to the question? I want to go on from that and show it has applied to not only a single case, but wholesale cases.

The Court. You want to show it applies particularly to this check?

Mr. Sharp. I want to show also with respect to these particular checks, that no objection was made at that time because upon legal advice, in view of this past practice, *I informed them* to go ahead and cash the checks. I want to bring that evidence before the Court.

Mr. Booth. We object to it as incompetent, irrelevant and immaterial and not communicated to the defendants.

The Court. Sustained.

Mr. Sharp. Exception." (This is not one of the assignments of error—R. p. 323.)

The appellants refer to no authority for their position that the "practice" of the company with reference to claims made for rectification of *errors* in pay checks due to failure to credit an employe with enough hours, or mileage, or days, etc., had a bearing on the

cashing of special forms of pay checks in the circumstances of the instant case.

If the action is, as counsel assert, an action on a judgment or decree as upon a liquidated or quasi-liquidated demand, then of course past practice with respect to ordinary pay checks could have no possible significance.

If on the other hand, and as we claim, the suits, while formally in equity are essentially actions at law by an assignee to recover unpaid wages earned by its assignors under the terms of a written contract as amended by an arbitration award, several reasons exist that preclude the consideration of anterior practice, even if appellants' evidence be given the fullest weight.

First. There is no evidence that any past practice ever related to checks concerning the amount or basis of which there was a dispute or discussion, as here, *before* the check was issued. Adjustments were made, notwithstanding the release form on the back of a payroll voucher-check, where a mere error in credit or in computation had been made in the carriers' offices which became apparent when attention was called to it. (Gorman, R. pp. 244, 260, 264.) There is no evidence of any such practice in a case where, as here, there was a wide and fundamental difference of opinion between the parties as to the correct basis for the computation of amounts payable by a large number of checks.

Second. The action is by an assignee. No assignor appeared to testify that in cashing these checks

he relied on the alleged prior practice. If the oral replication to our pleas of accord and satisfaction and release is based on the theory of estoppel *in pais* it is well settled that the party setting up such an estoppel should have *relied* upon the conduct of the other and been *induced* by it to refrain from acting (*Ketchum v. Duncan,* 96 U. S. 659; *Thompson v. Bank,* 150 U. S. 231-244). Says the Court in the *Ketchum* case, supra (p. 668): "An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury and he only can set it up." No exception was taken to the refusal of the trial Court to permit Mr. Deal (R. pp. 279-280) —after he stated that many of the men took up with him "the question of cashing the checks" and that he "told them to cash them"—to testify that he told them he was doing so on counsel's advice and what that advice was. But even if he had so testified there was no offer to show that his position or his counsel's position was communicated to the carrier or that it had any reason to believe that past practice with regard to mistakes in ordinary pay checks was relied on or about to be relied on in cashing checks that bore on their faces a statement that they were for a definite *and unusual* purpose.

Third. We argued to the trial Court, and repeat that argument here, that the situation set up by counsel is closely analogous to waiver of the statute of limitations. Such a waiver, as to a particular character of transactions, might be a general policy of a business institution and known to all of its customers,

yet it would be entirely optional with the management to plead the statute in a given case, particularly one in which there had been a dispute existing as to what was due and a check was given and cashed.

Fourth. In each case prior to the issuance of the checks in question the carrier, by disregarding the "in full" endorsement merely waived it as to that particular check, feeling that insistence thereon, *in the circumstances of the particular case,* would be inconsistent with fair treatment of the employe. Reputable business men use endorsements of this character as a shield—not as a sword. It is not shown that in any of those cases there was any dispute as to the proper contractual basis for the check. The final adjustment checks in the cases at bar were the result of a strenuously contested adversary proceeding in which the parties dealt at arms length and felt it necessary to be represented by counsel at all stages of the controversy as well as to evidence their agreement by a written stipulation filed with the District Court, and which provided (R. p. 29, par. 4) that it should be incorporated in and *confirmed* by the final judgment. When Mr. Deal saw the checks they unmistakably showed on their faces the special account for which they were issued. He at once realized that they were for lesser sums than he had claimed to Mr. Hancock should be paid, but he did not go to the carriers and protest or ask whether they intended to treat the checks and their endorsements as ordinary pay checks and keep open the question of sufficiency of amount. He told the men to cash the checks, having previously discussed

the matter with the Union's attorneys. His attorney's advice was not communicated to the carriers. The Union's first protest was by its attorney's letter nearly three months after the men endorsed and cashed the checks and retained the money. They might have returned the checks, or, if counsel's position be sound, cashed them and rescinded the endorsement. But such a rescission would have necessitated either a bona fide offer to restore the money or a restoration thereof. That is exactly what they did not desire to do. They chose to retain the money and rely on an uncommunicated mental reservation based on an inapplicable "practice". Either that was their attitude or the claim of reliance on past practice is, as we more than suspect, a mere afterthought. It was not suggested in the letters counsel for the Union wrote to the carriers in January, 1929, three months after the checks were cashed. Those letters threatened contempt proceedings on the theory of the carriers non-compliance with a judgment. (R. pp. 195-9.)

Fifth. Conduct or practice of the carriers antecedent to the giving and cashing of these checks cannot be relied on as a *waiver* of the right to insist that the receipt in full be given full weight. A waiver of a right must be of an existing right. For example—a statute of limitations may by agreement be extended or tolled but it cannot be waived until the bar has fallen. The right of the carrier to insist on the releases here considered did not, of course, arise until their execution and the cashing of the checks. No consideration existed for any prior or anticipating waiver;

no right existed which could be waived by a course of conduct, if, as we deny, conduct may constitute a waiver to become operative as to independent, and subsequent transactions unconnected with the transactions in which a waiver was actually made, even though there be a general similarity between the two sets of transactions.

The language of Mr. Justice Harrison in *San Bernardino Investment Co. v. Merrill,* 108 Cal. 490, on page 494, seems exactly in point. He there said:

> *"The term 'waiver' or 'to waive' implies the abandonment of a right which can be enforced, or of a privilege which can be exercised, and there can be no waiver unless at the time of its exercise the right or privilege waived is in existence.* There can be no waiver of a right that has been lost. 'Waiver is a voluntary act, and implies an election by the party to dispense with some thing of value, or to forego some advantage which he might, at his option, have demanded or insisted upon' (per Cooley, J., in Warren v. Crane, 50 Mich. 301). Bouvier defines waiver as 'the relinquishment or refusal to accept of a right'. (See also Stewart v. Crosby, 50 Me. 134; Shaw v. Spencer, 100 Mass. 395, 97 Am. Dec. 107; 1 Am. Rep. 115; Dawson v. Shillock, 29 Minn. 191; Bishop on Contracts, sec. 792.)

The Federal cases on release.

As we have heretofore stated, defendants in all cases pleaded "accord and satisfaction" as well as "release". Even though this Court may entertain

a doubt as to whether there was, within the strict rules laid down by some cases, an accord and satisfaction, nevertheless there was a release and acquittance, as shown by the following decisions:

In *De Arnaud v. United States,* 151 U. S. 483, there was an appeal from a judgment of the Court of Claims for $1,000,000 in plaintiff's favor for services as a military expert. Prior to suit he had been paid various amounts, the last check reading: "For services and expenses as special agent of the government $2000.00. Received, Washington, January 21, 1862, from John Pitts, disbursing clerk for the War Department, two thousand dollars in full, for the above account". The Court said (p. 494):

> "In the absence of allegation and evidence that this receipt was given in ignorance of its purport or in circumstances constituting duress, it must be regarded as an acquittance in bar of any further demand."

Appellants' attempt to show that in the case of *St. Louis etc. Co. v. United States,* 268 U. S. 167, 176, the Court came to an exactly contrary conclusion and state that the decision explains there is a different rule in regard to government claims, and there was an accord and satisfaction based on a disputed claim. An examination of that case, however, shows that the Court merely held that under the facts it was not an accord and satisfaction; that payment of a liquidated debt was not sufficient consideration for release by creditor of *other* unliquidated claims. The only reference to the *De Arnaud* case is in the footnote, page

176, where it is stated: *"There was a receipt in full or a release"*. (Italics ours.)

The case of *Chicago-Milwaukee Ry. v. Clark,* 178 U. S. 353, 368, 369, was an action upon a contract. Clark accepted a writing executed and delivered to him, acknowledging the receipt of a certain sum of money "in full satisfaction of the amount due me on such estimates and in full satisfaction of claims and demands of every kind etc. * * *". That action was filed five years and nearly five months after the receipt of the money and the execution and delivery of the discharge. The Court cited many cases from other jurisdictions, including that of *De Arnaud v. United States,* supra, and concluded:

> "Without analyzing the cases, it should be added that it has been frequently ruled by this court that a receipt in full must be regarded as an acquittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud or mistake."

The instant suits were filed within two days of five years after the judgment affirming the award was rendered. The final checks were paid within a week after the judgment was entered.

In

> *United States Bobbin & Shuttle Co. v. Thissell* C. C. A. 1st), 137 Fed. 1 (Cert. denied 199 U. S. 608),

it appears that a check was sent an employe with a letter stating that the check was in full payment of

balance of salary due and "unless you find above correct you will return our check and statement". A receipt was enclosed. The employe replied that he had deposited the checks and that when he had time and opportunity, he would examine the letters, and if found correct, they would receive proper attention. The Court said (p. 2):

> "The plaintiff did not sign the inclosed receipt, and his letter shows that he wished to keep the matter open. Notwithstanding this, we are of the opinion that his appropriation of the check, under the circumstances stated, was an acceptance of the terms upon which payment was offered. The weight of authority is to this effect."

Yazoo & Mississippi Valley R. R. v. Webb
(C. C. A. 5th), 64 F. (2d) 902,

was a suit based on a contract between the railroad and the Brotherhood of Railway Trainmen. Webb, a negro, had worked for the railroad, first as a brakeman and afterwards as a train porter. He got judgment in the Court below on the theory that he was entitled to a flagman's pay, the District Court apparently disregarding the defense that each two weeks he had cashed paychecks expressed to be "In full for services rendered".

In reversing the judgment, the Circuit Court of Appeals in the concluding portion of its opinion (p. 905), upheld the defense based on the language of the paycheck, and said:

> "* * * One cannot keep money offered as in full settlement of a disputed claim and reject the condition on which it is offered."

In

Samuels v. Drew, 7 Fed. (2d) 764 (Affd. in 7 Fed. (2d) 766),

an employe was working for a receiver with no agreement as to the amount of his compensation. There was a dispute between the receiver and the employe as to the amount, and while the receiver told the employe that the payments were to be in full compensation, the employe never assented to the terms and "was constantly pressing for some modification of them". Nevertheless, he cashed his paychecks, which apparently bore no endorsement that they were in full of services. The Court says (p. 766):

> "When, therefore, he received his January check and all other checks, Conway had his option, being on his own written admission advised that it was to be in full compensation, either to turn it back and press for larger pay, or to take it and be satisfied."

In *Schwartzenburg v. Mayerson* (C. C. A. 6) 2 Fed. (2d) 327, a check was sent by the purchaser of a consignment of fish, to the seller, with the endorsement "in full to date". The seller wrote the purchaser that it would not accept the check upon those terms, but the Court said (p. 328):

> "nevertheless it did accept the same with this indorsement thereon, and deposited it in the bank to its credit before it received any reply from the defendant to its letter rejecting the check in full payment. Under the admitted facts and circumstances of this case, we do not think the plaintiff can now be heard to say that the check

was not accepted by it in full satisfaction of all claims against the defendant, accruing prior to that date."

Further State Court cases.

In *Tanner v. Merrill,* 108 Mich. 58, plaintiff sought to recover a sum which had been deducted from his wages by defendants, his employers. The amount of his wages was not disputed, but the right to make any deduction was questioned. Plaintiff received the amount of his wages less the deduction, and gave a receipt in full, and afterwards brought suit to recover the balance on the ground that, having only received the amount admitted to be due, there was no consideration for the release as to that which was disputed. The Supreme Court of Michigan held that the plaintiff could not recover, and that the rule that a receipt of part payment to be effective in the discharge of the entire debt must be rested upon a valid consideration, is limited to cases where the debt is liquidated by agreement or otherwise; that a claim any portion of which is in dispute cannot be considered to be liquidated within the meaning of the rule; and that a receipt in full, given upon payment of the undisputed part of the claim, after a refusal to pay another part which is disputed, is conclusive as against the right of the creditor to recover a further sum, in the absence of mistake, fraud, duress or undue influence.

In *Hamilton & Company et al. v. Stewart,* 105 Ga. 300, 302, the Court said:

"The retention of the amount forwarded, declared to be in full settlement of the claim held

by the person to whom it is sent, coupled with a failure within a reasonable time to decline the proposition, will raise a conclusive presumption of an acceptance of the terms and conditions set forth in the proposal. * * *

Nothing could be clearer than the proposition that where one person delivers to another property, to be retained upon a condition stated, the party receiving it can not retain the property and repudiate the condition."

In *Jenkins v. National Mutual B. & L. Asso.,* 111 Ga. 732, 734, it was held:

"that where a debtor remitted to a creditor less than the amount of the debt as claimed by the creditor, upon the distinct understanding that the same was to be received in full discharge of the debt, if the creditor did not, within a reasonable time after the money was received, repudiate the offer and return the money remitted to him, all liability on the debt would be discharged."

In *Johnson v. Burnett,* 17 Cal. App. 497, 501, the Court said:

"Where tender is made to a party to whom a debt is owing of an amount less than that which is claimed to be due, and the amount claimed to be due is unliquidated, and the party making the tender in express terms offers the payment as in full satisfaction of the disputed account, the offeree in that case is bound, either to reject the offer, or to accept it upon the precise terms denoted by the tender. (*Creighton v. Gregory,* 142 Cal. 34 (75 Pac. 569); *Weller v. Stevens,* 12 Cal. App. 779 (108 Pac. 532).) If he appropriates to

his own use the amount tendered, he cannot afterward be heard to say that he did so upon any terms other than those to which the person making the offer imposed upon him. Such a state of facts is that precisely illustrated by the evidence in this case. It was said in *Nassoiy v. Tomlinson,* 148 N. Y. 326 (51 Am. St. Rep. 695, 42 N. E. 715), where a similar case was considered: 'The plaintiff cannot be permitted to assert that he did not understand that a sum of money, offered "in full", was not, when accepted, a payment in full. * * * He was bound either to reject the check or by accepting it accede to the defendant's terms. * * * He could not accept the benefit, and reject the condition. * * * The use of the check was *ipso* facto an acceptance of the condition.' "

Appellants have cited no cases that announce any different rule than that stated in the above. They rely on the case of *Sierra etc. v. Universal etc. Co.,* 197 Cal. 376, but therein the Court said:

"Upon receipt of the bill covering power delivered for the month of August, 1918, the defendant refigured the same applying the nine-tenths factor which made a reduction for the month of $420.12. A new bill with voucher attached, based on the refigured amount, was prepared by the defendant and transmitted to the plaintiff together with a check for the smaller amount. The wording of the voucher was as follows: 'Received of Universal Electric & Gas Co. in full payment of above account six thousand eight hundred twenty-six & 42/100ths dollars'. The plaintiff refused to sign the voucher but wrote the defendant as follows: 'We enclose herewith a receipt for $6,826.42, the amount of your check on account of August, 1918, power

bill, $7,246.54. Because of the deduction which you have made from our bill we are obliged to furnish you with a receipt on account. We have accepted the check under protest and have passed the same to your credit.' The following is the form of the receipt: 'Received of Universal Electric & Gas Co. six thousand eight hundred twenty-six and 42/100ths dollars to apply on account of August, 1918, power bill. Unpaid balance, $420.12.' The same procedure was followed by both parties each month thereafter to and including February, 1919. From March to June, 1919, the defendant continued to send the vouchers to the plaintiff with checks for the smaller amount. As to these vouchers, the plaintiff signed and returned them, first crossing out the words 'in full payment of above account' and inserting the words 'on account' of the bill for the particular month. Beginning July, 1919, and ending December, 1919, when the service was apparently discontinued by mutual consent, the defendant on receipt of each monthly statement for that period made out a bill for the smaller amount and submitted it with a voucher check on the back of which was the following: 'If not correct return without alterations and state differences. Make all indorsements below. This check is hereby accepted by the payee in full payment of the within account and indorsed as follows.' These checks were indorsed by the plaintiff without change or alteration. In addition to the foregoing procedure it appears that early in the period covered by this controversy the parties referred the matter to their respective attorneys and payments were thereafter made by the defendant through its attorney with an accompanying letter beginning December 9, 1918, as follows: 'This

check represents the amount admitted to be due by the Universal Company on account of the items for electrical energy furnished and charged in your bill in the month of October, 1918. The check does not include two items mentioned in that account, viz.: the surcharge of one and one-half mills per K. W. H. and in addition deducts 1/10th of the maximum demand change charge * * * It was the expectation of the Universal Company and of myself that before tendering the enclosed check it would take up with your attorney * * * the items in question as to which payment is not made * * * and if agreeable to you, this procedure will be adopted. I am in hopes of obviating the necessity of resorting to the arbitration provisions of 1915 contract * * *'' The checks for the remaining months of the period were transmitted through the defendant's attorney and were accompanied by his letters identical in form as follows: 'Herewith please find Universal Gas & Electric Co.'s check * * * being the amount admitted to be due on your bill * * * The check is similar to that sent you with my letter of December 9, 1918, covering October bill, the same deductions being made from your statements as rendered and the same reservations and conditions being present as regards the items withheld * * * As on previous occasions you will undoubtedly not be in a position to sign the full payment voucher accompanying the check, but if you will attach a receipt and return the same with the voucher, pending final adjustment, this will be appreciated'.''

Moreover, the Sierra Company was a public utility and the Court says (p. 387) that "the statute ex-

pressly forbade the plaintiff to charge or receive compensation for electric energy at any rate other than that specified in the contract duly filed. It therefore could not lawfully accept the amounts tendered by the defendant".

In *Berger v. Lane,* supra, 190 Cal. 443 (a nonsuit), the check was not endorsed in full payment. The same was true in the *Lapp-Gifford* case, supra, 166 Cal. 25, as well as the case of *Messer v. Tait's Inc.,* 121 Cal. App. 698, 701. In the case of *Carpenter v. Markham,* 172 Cal. 112, 115, cited on page 55, accord and satisfaction was not pleaded. No check was involved but a receipt was given in connection with a bond. The Court held that the receipt could be explained and therefore was not a receipt in full. In *Hansen v. Fresno Jersey Farm etc. Co.,* 74 Cal. App. pp. 291-293, the action was on an account stated. Checks were not endorsed as payment of account in full, and accord and satisfaction was not pleaded. Appellants seem to place great reliance on the case of *Whepley Oil Co. v. Associated Oil Co.,* 6 Cal. (2d) 94, since they cite it in several places but an examination of that case shows that the plaintiff instituted an action for the purpose of recovering from defendant a specified sum claimed to be due as royalty on casing head gasoline. Provisions of the agreement of lease formed the basis for plaintiff's claim that defendant was legally obligated to pay the amount for whose recovery the suit was brought. It does not appear from the decision whether the accord and satisfaction was specially pleaded. It was further stated that the evidence showed the appellant

acquiesced in the proposal for arbitration of the controversy; it further appeared that the checks which were endorsed in full for the royalty payments were deposited in a bank as agents for the lessors (plaintiffs). *The Court found the bank was empowered to do no more than to receive and acknowledge the payments.*

Appellants place emphasis upon those portions of several California decisions which hold to the effect that the tender must be accompanied by "acts or declarations that it amounts to a condition that if the check is accepted at all it is accepted in full satisfaction of the disputed claim and the creditor so understands it", and at page 62 of their brief the words "and the creditor so understands it", is doubly emphasized. That language is quoted from *Berger v. Lane,* supra (190 Cal. 443), which case as we have pointed out was a case of nonsuit and the check was *not* endorsed "in full payment". But, as the Court said in the remainder of the quotation at the bottom of page 62 of appellees' brief "its acceptance even though the creditor states at the time that the amount tendered is not accepted in full satisfaction, *constitutes an accord and satisfaction".* (Emphasis ours.) This decision is in harmony with the decisions from other jurisdictions cited by us. So it seems clear thereunder that the acceptance and cashing of the checks endorsed in full payment and retention of the money was sufficient consideration for an accord and satisfaction.

Under the many cases cited by us, we believe that there was accord and satisfaction, and also that the

cashing of the special checks and retention of the money was a release and acquittance. The Federal decisions we have cited are quite controlling on both points.

An Accord and Satisfaction can be had of an amount due on a Judgment. The Union was not a Judgment Creditor.

Appellants argue that the amounts sued for were due on a judgment. They treat that judgment as a liquidated demand; that position is obviously untenable, but whether liquidated or unliquidated they insist that the Union was the judgment creditor, although assignments were taken from individual 12-24 hour men; first, to the members of the unincorporated union collectively, and then by the unincorporated association (union) to the incorporated association. (Para. II, Complaint, R. p. 121; Finding VI, R. p. 126.)

That the Union is in no sense a judgment creditor, but throughout the arbitration and impeachment proceedings and up to the entry of judgment acted merely as an agent or representative with no proprietary interest in increased pay or back-pay, we believe we have demonstrated in the preceding chapter VI.

Treating, then, the demands of the 12-24 hour men for back pay as arising upon or, if one pleases, as merged into, the final judgment and evidenced thereby, it is clear that they, nevertheless, each 12-24 hour man who had not been paid in accordance with the retroactive application of the terms of the award, and not the Union was a judgment creditor.

The final judgment (R. pp. 23-24) provides (R. p. 30) that the carriers "shall pay the *employes* the following wages" (increased monthly pay); that they shall "put in effect" (R. p. 31) the amended watch Rule 6; that (R. p. 33) they "shall pay all overtime due or to become due" under Rule 8; and, finally (R. p. 34), that they shall "cause *all of said employes to be paid* all back pay retroactively or otherwise due *to said employes* or any of them in accordance with said award or this judgment". Thus if the judgment be treated as a judgment for money, it was, whether liquidated or unliquidated in amount clearly in favor of the individual employes as their interests might appear and not in favor of their representative the *Union.* If the carriers' obligation to pay back pay solely arose from or was based on the judgment the trial Court was clearly correct in concluding Finding XVIII by stating (R. p. 136): "The judgment was not one for which the Union could enter satisfaction of record as the individual employes were the actual judgment creditors of the company."

The authorities are conclusive to the effect that such a demand even though based solely on a judgment is susceptible of an accord and satisfaction for a lesser amount than that which the judgment, properly construed and applied, would give the judgment creditor. While cases in State Courts—none in California—may be found to the contrary, the Federal decisions are conclusive on the point.

As early as 1851 it was so held in *Farmers Bank v. Groves,* 53 U. S. 51 on page 58, s. c. 13 L. ed. 889.

Then came *Boffinger v. Tuyes* (1887), 120 U. S. 198—bot. p. 205, 30 L. ed. 649. To the same effect is *In re Freeman,* 117 Fed. 680 on page 684. The *Boffinger* case, supra, so far as we can ascertain from Rose's Notes and Shepard's Citations has never been modified or criticized.

We respectfully submit that the 12-24 hour men as individuals had full power to settle, compromise, settle and release their claims under the judgment up to the moment they parted with that right by assignment to the Union, which took title and now sues as an assignee and not as an original judgment creditor.

VIII.

COSTS.

The appellants seek to escape costs, conceding that if the proceedings are in equity costs are discretionary.

It is not true that the carriers have violated any "agreement to abolish 12 hour watches upon the rendition of the award"; nor is it true that they have "wilfully refused to carry out the award, although in writing they agreed to put it into effect immediately".

The carriers felt aggrieved and injured, believing that the Board had unlawfully refused to consider evidence the carriers offered on the subject of exceptions to Rule 6. There was an agreement to arbitrate but no agreement not to petition on statutory grounds

to impeach the award; nor did the carriers agree not to appeal to this Court. They exercised that legal right and should not be penalized for doing so.

The Union and its Secretary-Manager waited five years—lacking two days—to come into the Federal Court, and when they did so proceeded on a theory that in itself violates the spirit and text of the award as well as the very principle for which the Union contended—equalization of hourly rates. Having pursued the appellees for five years with unjust assigned claims taken on a contingent basis and used both State and Federal Courts as experimental procedural laboratories, they now ask to be relieved from the proper consequences of their own persistence. If this were an ordinary suit in equity the Court would not hesitate to impose costs on the losing party. We respectfully submit that counsel suggest no reason for the Court to deviate from the usual and ordinary practice.

CONCLUSION.

It is not true, as stated by appellants in their "Conclusion" on page 78, that the carriers pledged in writing that they would abolish the 12 hour watches immediately upon the decision of the Board of Arbitration. There was no undertaking on their part that they would not avail themselves of the statutory right of review of that decision on the grounds afforded by Section 9 of the act.

It is not true, as stated, that the rules of the company, the past practice or the judgment of the Court

required overtime "for all hours in excess of eight hours that should have been worked"; to the contrary overtime in excess of 8 hours only applied to regularly assigned watches of 8 hours, which on a monthly basis were 26 or 27 hours per watch and which were required by the rules to be worked six consecutive days, except on "broken assignments".

It is not true that the carriers "*admittedly* did not pay that overtime". By the final adjustment the carriers paid an amount equal to the daily pay of an 8-16 hour man for the first 8 hours of each 12 hour watch actually worked and paid the same hourly pay as the 8 and 16 hour men for each of the remaining 4 hours of each of their 12 hour watches. That is specifically found by the Court and, as we have shown, is amply sustained by the evidence.

It is not true that there "was a specific understanding as to these pay checks that they might be corrected afterward". There is not a syllable of evidence in the record—even from plaintiffs' witness Deal—that there was any such understanding *as to these checks* and the conclusion is an exceedingly careless misstatement not supported by the evidence.

There were no "ingenious mathematical formulae used in making the final adjustment". The Hancock formula was simple, fair and entirely adequate and produced the exact effect found by the Court—that of fully compensating the 12-24 hour men on the same basis of pay per day and per hour as the 8-16 hour men received during the same period, and that these men were paid at the 8-16 hourly rate for each additional hour over 8 hours.

The defenses of accord and satisfaction and of release were properly pleaded, fully proven and amply sustained by the law on those subjects.

The findings of the trial Court are fully supported by the evidence and its conclusions of law are legally correct.

Therefore, the several orders and decrees appealed from should be affirmed.

Dated, San Francisco,
May 8, 1936.

Respectfully submitted,
HENLEY C. BOOTH,
A. A. JONES,
Attorneys for Appellees.